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AN
ESSAY
ON
Arbitration;
MORE PARTICULARLY AS IT RELATES TO
COMMERCE AND MARINE INSURANCE;
WITH AN
APPENDIX
ON
FORCED ARBITRATION.

A NEW EDITION;
IN WHICH THE LAW AND THE PRACTICE ARE BROUGHT
DOWN TO THE PRESENT DAY.

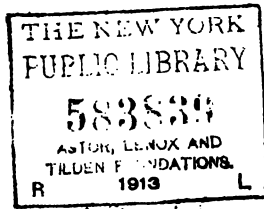
BY
ROBERT STEVENS, ESQ.
AUTHOR OF AN ESSAY ON AVERAGE, &c.

References to Arbitration are sometimes the means of saving expense, and are particularly adapted to the settlement of MATTERS OF ACCOUNT and MERCANTILE TRANSACTIONS, which are difficult and almost impossible to be adjusted on a trial at law.—3 Black. Com. 17.

LONDON:
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TO
SIR JOHN CAMPBELL, KNT.

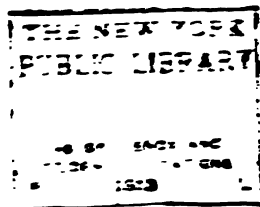
REPRESENTATIVE IN PARLIAMENT OF THE CITY OF EDINBURGH,
HIS MAJESTY'S ATTORNEY-GENERAL,
&c., &c., &c.,

WITH
GREAT RESPECT
FOR HIS
PROFESSIONAL TALENTS,
AND HIGH ESTEEM
FOR HIS
PERSONAL CHARACTER;

THIS ESSAY
IS
(WITH HIS PERMISSION)

DEDICATED,

BY
HIS MUCH OBLIGED AND OBEDIENT SERVANT,
THE AUTHOR.



PREFACE.

THE First Edition of this Essay was written under great inconveniences, as the author then resided abroad, and was, consequently, deprived of the advantages to be derived from the consultation of the law authorities, and from receiving the advice of his legal and commercial friends, which he should have felt it his duty, and consistent with his inclination, to have followed.

From having himself practised for many years as an insurance and mercantile arbitrator, he is able to judge of the necessity of making the important subject which he has ventured to treat of more generally known and understood.

Of this new Edition much has been re-written ; and many additions have been made to the work, to bring the Law and the Practice, as far as concerns Commercial and Insurance Arbitration, down to the present day.

The author feels himself greatly indebted to the Law Reports ; to the various legal works in which this subject has been so ably treated,* and, more particularly,

* KYD on Awards ; CALDWELL on the Law of Arbitration ; WATSON on the Law of Arbitration and Awards ; BYTHEWOOD'S Selection of Precedents, articles—Arbitration, Vol. II., Award, Vol. III.

to Mr. Chitty's luminous and concise essay on Arbitration, which is embodied in his excellent and useful work on "the Practice of the Law," &c.—to him, and to all he takes this means of expressing his acknowledgments and his thanks.

During the author's residence abroad, he has had the opportunity of consulting the French authorities on the subject of Arbitration, and has in his Essay availed himself of the erudite work of M. de la Bilenerie, late chief justice (*president*) of one of the courts of judicature, the last edition of which was published a few months since in Paris. In the Appendix the author has said a few words on the subject treated of at great length by the above-mentioned writer, in his second volume, under the head of "*De l'Arbitrage Forcé*;" to which (appendix) he requests the particular attention of his commercial readers.

He avails himself of this opportunity to present his sincere thanks to the honourable and learned gentleman to whom this Essay is, with some temerity, dedicated, for the very prompt and flattering manner in which his compliance with the author's request was communicated, and for the personal kindness which he received from him, when he practised as a mercantile arbitrator in the city.

New City Chambers,
13 Dec., 1834.

AN
ESSAY
ON
ARBITRATION;
WITH
AN APPENDIX
ON
FORCED
ARBITRATION.

PRELIMINARY REMARKS.

[ARBITRATION has of late years become of the very first importance to the mercantile world; the object of every one engaged in commerce being to obtain a settlement of all his disputes with as little delay and at as small an expense as possible; and it would seem obvious to the most casual observer, that many cases must be constantly occurring in the vast and intricate transactions of the Royal Exchange and of Lloyd's, which it would be preferable to submit to the *deliberate judgment* and comparatively immediate decision of one, two or three men, who all, from their previous habits, are well acquainted with such business, than, after going through the usual and necessarily protracted delays of a suit at law, to the *prompt decision* of twelve men, inevitably possessing different degrees of experience, knowledge, and intelligence.

The author is too well acquainted with, and has too great a veneration for the principles of the law of England, to depreciate the value of the decisions of its courts of judicature; yet it cannot be doubted that, notwithstanding these, and all that has been written (and much so ably written) in elucidation of the various subjects connected with the commerce of this great trading nation, there are still cases very frequently occurring on which differences of opinion arise, even among the best intentioned and best informed men. These differences in the practice, always taking the law, when it is settled, as the ground-work, the author humbly suggests are properly **THE SUBJECTS OF ARBITRATION.**

[The legislature itself has, indeed, by a late act (3 & 4 Wm. IV. c. 42), recognised the principle above stated by having at length interfered in aid of an object by which the **USEFULNESS** of arbitrations may be greatly extended, and thus be conducive to the much-desired end of all disputes—**SPEEDY JUSTICE** and **A DIMINUTION OF EXPENSE.**]

^a 2 Chitty, Prac. Law, P. 1. c. 3.

This subject will be treated of more at length hereafter. At present it is only necessary to remark generally, that the great advantages which arbitrations have over suits at law

Adv.

are these;—the parties themselves can be heard on oath, and produce their documents without the necessity of proving every item, and every handwriting, which the forms of the courts of judicature require. Many cases occur, where *Ad.* it is essential, for the ends of justice, that the strict rules of law should be dispensed with; for, from want of precaution, or from other causes, it often happens (and more generally with the best disposed), that there is no other evidence to be had than the parties themselves; and, unless men were to adopt the maxim of the *sophists*—of “living with their friends as if they would one day become their enemies,” such cases must often occur. [It has indeed been very properly said, (and that by a lawyer,) that a judge who can examine the parties themselves; who can observe their looks and demeanour; and who, without being confined to the strict rules of evidence, is at liberty to decide from circumstances of probability, has manifestly a great advantage over judges in courts of law, where the forms of action, modes of pleading, and rules of evidence must be strictly adhered to.]

CHAPTER I.

OF THE ARBITRATOR.

AN ARBITRATOR is an arbitrary judge. This is the true etymology, which we trace back to the Roman law ; for, in the Institutes which bear the title of "THE ELEMENTS OF JUSTINIAN," the *discretionary judge* is what we call an arbitrator ; and the actions depending on his arbitration are called "Arbitrary." An arbitrator was one of the most ancient and honourable of judges ; for we frequently read in the history of Rome, that arbitrators were appointed to settle differences between hostile kings, who were allies of the Roman people.

The difference between the terms Arbiter and Arbitrator is great, though as regards the *practice* it is scarcely worthy of notice, for the latter is now in general use. An ARBITER, however, in law, is a *barrister* appointed by a judge to decide on a legal question ; beyond

which he cannot go: while an **ARBITRATOR** is, on the contrary, any person chosen by the parties at variance to settle their differences in the way he himself may think just and proper.

The French, to whom we were in former days so much indebted for our legal knowledge, and whose decisions are still quoted and respected by our judges in matters of civil law, view the subject in the same light; for, according to it, an *Arbitre* is one *qui doit garder les formalités de justice*; and an *Arbitrateur* est un *amiable compositeur à qui l'on donne pouvoir de se relacher du droit*.^b

^b Code de Pro.
Civ. art. 1019.
Dict. de Droit. art.
Comp.

We may be allowed to notice that these definitions are the reverse of the original meaning of the words:—**ARBITER**, “absolute master—“supreme disposer”; *i. e.* one who decides according to his own will and pleasure, or as may seem to him fit and proper; which is the precise meaning of our term **ARBITRATOR**.

We proceed to treat of the **COMPETENCY** and the **ELIGIBILITY** of the Arbitrator; before which, however, it may be proper to say something regarding his power as we find it treated of in the Roman law, and as it is recognised by the law of England.

An Arbitrator, then, is a judge in equity;

and his judgment is, like that of the Lord Chancellor, presumed to be governed purely by the law of nature and conscience. From his sentence there lies no appeal ; and no legal or other tribunal can inquire into the equity of his decision. Such was law two thousand years ago, and such it is at this day.^c

^c Digest l. 17, t.
2, § 76.
² Eq. ca. abr. 80.

As far as regards *competency*, — the law supposes every man capable of judging, whatever may be his character for wisdom or even integrity, **COMPETENT** to be an Arbitrator ; because it is said, “ he is appointed by the parties themselves, and if they choose an improper person they must suffer for their own folly.”

The persons whom the law considers *incompetent*, and whose award would be set aside, are as follow :—

1. Those who by nature or accident have **NO DISCRETION** ; such, *e. g.* as an insane person, or one deaf and dumb.^d
2. One **UNDER AGE**, called, in law, an infant.^e
3. One under the **CONTROUL** of another ; such, *e. g.* as a married woman.^f It has been held, however, that a *woman*, who has the free exercise of her rights, is not incompetent to be an arbitratrix.^g
4. A person considered infamous in law by

^d Com. Dig. Hib.
(C.) Bac. Abr. Arb.
(C.)

^e *Idem.*

^f *Idem.*

^g Watson Arb.
p. 54, note.
⁸ E. T. R. 4.

having been convicted of TREASON, or FELONY, or PERJURY.

5. One immediately or even indirectly INTERESTED in the event; such, *e. g.* as a near relation, and, more particularly, of a party in the difference, for *aliquis non debet esse judex in propria causa*, is a maxim in law; and because one of the great ends of the institution of civil society is to prevent men from being judges in cases wherein they are concerned, and to remit the decisions of adverse interests to those who have *no interest* in the determination of them.^h But where the adverse party was aware, when the submission was made, that the arbitrator was interested, and did not object to it at the time, the award was held to be good.ⁱ

^h Dig. l. 4 t. 8.
Kyd, c. 4.


ⁱ 4 Mod. 226.
Comb. 218.
Hard. 44.
3 Bla. Com. 229.

The French *jurisconsultes* doubt whether a *foreigner*, a *bankrupt*, or a *man in prison for debt*, may be chosen as an arbitrator; but they lean to the side of the affirmative, from not wishing to extend more than is absolutely necessary the list of incapacities. In general, the French agrees with the English law in regard to those who are *incompetent* to be chosen as an arbitrator, except that, following the

Roman law, it excludes a *woman* from that office. Clerical men, such *e. g.* as archbishops, bishops, canons, prebendaries, &c., are said to be competent, because, it is said, they participate "*aux bienfaits du contrat social.*"

It is almost unnecessary to observe, that in regard to a person who undertakes to practise as a general arbitrator, there is an essential difference between being legally *competent* and professionally *eligible*.

The latter is a delicate subject for the author to treat of, but he has no alternative, for in a work of this nature it would be unpardonable to pass it over in silence; and more particularly, as *it is entirely in consequence of an improper choice of arbitrators*, that references have been often deprecated as contrary to their intention, viz.—retarding the settlement of differences, instead of bringing them to a close. In former times, when our commerce was not so extensive, and mercantile business was conducted on a comparatively limited scale, the character and requisites of a merchant were not precisely what they are at the present day. Now, many of the merchants of England are her senators; many rank with her nobility; and some (as the directors of one of our great



trading companies) are in power greater than even "the princes of the earth." Heretofore, merchants of London *aspired* to the rank of chief magistrate of the city ;—these were the times when "the Lord Mayor of London was directed to appoint certain grave and discreet men to be arbitrators of mercantile differences."* It may readily be conceived, that if * 43 Eliz. c. 12. this custom were to be revived, but few persons on the Exchange or at Lloyd's would be found to submit their cases to their decision ; for though to be grave on solemn occasions is as desirable as to be discreet on all, yet gravity and discretion are far from being the principal requisites in a mercantile arbitrator.

The word itself, **ELIGIBLE**,—implies "worthy of preference ;" therefore it would seem that *other qualifications* are necessary in those who pretend to be practitioners in this line. These shall be briefly stated :—The first, as a ground-work, is a general knowledge of the law, as it relates to commerce, navigation, marine insurance, and shipping. The next essential requisite is, a complete acquaintance with mercantile business, (or, as an old merchant once expressed himself to the author,—“his mind must be rounded by commerce,”) from the

most extensive and intricate transactions, down to merchants' accounts ; and this latter, though generally considered as the exclusive province of "an accountant," must not be treated too lightly ; for no one can doubt, that a man well-skilled in figures, might in complicated matters of account give a turn to a balance, which it would require all the knowledge of an arbitrator, *equally* skilful with himself, to unravel and detect : in this acquaintance with mercantile business, we include a general knowledge of the principal ports and trading countries in the world, and their exchanges, monies, weights and measures, customs of trade, &c. To these must be added, a *practical* knowledge of ships and sea-voyages ; and a thorough knowledge, also practical, of the business of Lloyd's, comprehending that of an underwriter and of an insurance broker.

The reader may perhaps imagine, that few persons will be found who possess these various, and in many respects opposite qualifications ; and he may infer from thence, that few are *eligible* as, or fit to be, professional mercantile arbitrators ; if he do so he will be correct, for after all that has been said, the greatest and most essential qualifications remain to be stated ; but these are indeed not to be obtained

by study or labour, for they depend upon the moral character of the man, and are obligations imposed upon the arbitrator from the nature of his duty ; they are as follow :—a disposition to act on every occasion with the strictest impartiality, without any undue regard to the party by whom he is chosen ; always recollecting that he is *not* his agent or his advocate, but *his judge* : to keep his mind free from prejudice ; to weigh well the evidence, whether oral or written, and to be open to conviction ; not to determine hastily, but to regulate his conduct by the two great principles which ought to govern in a court of equity, “*justice and utility*.” Finally, the object of his wishes ought at all times to be, to act (according to one of the oldest definitions which has been given of justice) with the constant and perpetual desire of giving to every man that which is due to him.¹

¹El. Just. 1. 1.
t. 1. § 1.

It has been observed by a legal writer on this subject, that, “were the parties submitting always certain of appealing to a judge of perfect wisdom and incorruptible integrity, the system of Awards would be highly beneficial to society.” This, if unexplained, would seem as if intended to discourage such a system altogether, because the learned writer must have

been well aware, that neither in the present, nor in any other state of society, could any judge, or even any man, of that description be found ; he however qualifies his observation by adding, "but this system, from the weakness and depravity of men, frequently becomes the instrument of the most flagrant injustice, and the most serious oppression ; for, from the manner in which arbitrations are often conducted, the parties, instead of obtaining a speedy termination to their disputes at an easy expense, are frequently altogether disappointed by having no determination at all, *and are often involved in a most expensive and tedious litigation.*"^m And a more recent writer on this subject has judiciously observed to the same effect ; alluding to persons undertaking references, *without being sufficiently acquainted with the law and principles of arbitration*, he says, that "the award, instead of terminating the difference, often becomes the source of disappointment and irritation, and makes a submission nothing but a costly introduction to a law-suit."ⁿ

^m Kyd. 393.

ⁿ Parker. pref. vi.

CHAPTER II.

OF THE PARTIES WHO MAY REFER, AND OF THE SUBJECTS WHICH MAY BE RE- FERRED TO ARBITRATION.

SECTION I.

Of the PARTIES who may submit their Differ- ences to Arbitration.

IT would appear evident to those conversant with the principles of the English constitution, that every person who has the legal disposal of his property, and whom the law recognises as having sufficient understanding for the purpose, may have the power to submit his disputes to the decision of a domestic tribunal, rather than to be forced into a law-suit, to obtain that justice which he thinks is his due ; and this accords with the modern French law, as modified in the *Code de procédure civil*, which enacts that, "*toutes personnes peuvent compro-*

mettre sur les droits dont elles ont la libre disposition.^a

^a Cod. Pro. art. 1003.

It follows, therefore, that the only persons incapable by law of submitting their disputes to arbitration, are precisely those mentioned in the preceding chapter, as incapable of acting as arbitrators ; *i. e.* in general, those persons who are under a natural or civil incapacity to enter into a contract: for, in law and in fact, every one capable of suing and of being sued may be a party to a reference, that is, as we have just observed, may agree to have his cause adjudged by a private tribunal instead of a public one.

This alludes to the *principals*. It is, however, legal in many cases for ONE PERSON TO SUBMIT FOR ANOTHER. Among these are the following :

^b Rolle's Rep. 208.
Sti. 351.
5 Ves. 646.

^c Combe, 318.
3 Lev. 17.
Freem. 62, &c.

^d 3 Moore, 674.
1 Br. & Bing. 355.

^e 3 Bing. 101, 500.
41 B. Moore, 340.
2 Mood. 328, &c.

^f 3 Esp. N. P. C. 101.
1 Lutn. 571.

1. A HUSBAND for his wife.^b
2. A PARENT or a GUARDIAN for an infant.^c
3. SIX PARTNERS may submit all their differences by three being bound to the other three.^d
4. ONE of several Partners may bind himself, *but not the others*, by his own submission, even of matters arising out of the business of the firm.^e
5. A TRUSTEE may submit for his *cestui que trust*.^f

6. A COUNSEL or an ATTORNEY may bind his client in his absence by his consent to an order of *Nisi Prius* referring a particular case;^g and the court will not set aside such a submission, even upon an affidavit of the client that it was against his inclination, and even his express prohibition. But in this case it has been very properly suggested, that the prudent course is always to have the client in court and let him decide for himself.^h ^{g Bac. Abr. Arb. (C.) but see Cald. c. 2.} ^{h 2 Chitty, Prac. 77.}
7. EXECUTORS and ADMINISTRATORS may refer disputes arising out of their respective situations.ⁱ But when *claimants*, this should not be without the concurrence of creditors, legatees, and next of kin; and when *defendants*, they would incur the risk of an award subjecting them personally to liability.^j ^{i Dyer, 216.} ^{j 2 Chit. Prac. ut sup.}
8. AN AGENT WHO UNDERWRITES POLICIES OF INSURANCE and settles losses for another has an *implied* authority to refer disputes arising out of such business.^k ^{k 4 Camp. N. P. C. 163.}

In general, however, where an AGENT is not *expressly* authorized by another to submit for him, he himself will be bound by the award, and not the principal for whom he submits. But in a case, where,

by a power of attorney, the principal authorized the agent "to act on his behalf in dissolving a partnership," and gave him leave "to appoint any other person he might think fit," he was considered to have authority to submit the accounts to arbitration.

It may be remarked on the above cases, as respects Agents or others referring for principals, that the WIFE and the INFANT will not be concluded by the submission of the Husband, Parent or Guardian ; though they (the latter) will be responsible to the opposite party for their default ; because the *wife* and the *infant* cannot delegate an authority they do not themselves possess.

ASSIGNEES of a *bankrupt's* estate, and of that of an *insolvent debtor*, are expressly prohibited from referring to arbitration, unless with the consent of the major part in value of creditors present at a duly convened meeting, or of the commissioners testified in writing, in case less than one-third in value of the creditors should attend ;^l and there is a provision nearly to the same effect in the General Insol-

^l 6 Geo. 4, c. 16.
1 & 2 W. 4, c.
56.

^m 7 Geo. 4, c. 57, vent Act.^m
24.

SECTION 2.

Of the SUBJECTS which may be referred to Arbitration.

It will be inferred from the preceding section, that great latitude is given to references; and in fact, every dispute connected with the *acquisition* and the *disposal of property* may be referred to arbitration; as may *any questions of law*; and *all personal wrongs* which would obtain compensation by the verdict of a jury, or which might be made the subject of indictment. This is the result of all that has been written (and that is not little) on the subject.*

* 11 E. T. R. 46.
7 Taunt. 428.
Kyd, c. iii.

The French law is not so liberal as ours in this respect; for it limits the subjects of reference to those which affect merely the private interests of individuals:—"la loi a pu permettre aux citoyens, libers de leurs droits, de compromettre sur leurs intérêts purement privés,—mais elle n'a pas dû les autoriser à insérer dans leurs conventions aucune stipulation qui toucherait directement ou indirectement à l'ordre public," says a learned writer, in commenting on the *code de procédure civil.*^o This excludes o 1 De la Bil. p. 68.

all those subjects for which, with us an indictment would lie.

It is scarcely necessary to say, that the power of referring matters to arbitration does not extend to the compounding of crime or of any action ; where it is necessary, for the benefit of society, that the offender should suffer as a public example. An act, therefore, which is liable to an indictment for felony, it would be criminal in the parties to submit to a reference. With this one exception **THERE IS SCARCELY ANY DISPUTE OR DIFFERENCE BUT MAY BE MADE THE SUBJECT OF ARBITRATION.**

Thus far as relates to the general principle. We now proceed to treat of those subjects which it may be *preferable*, and of those which it is sometimes *absolutely necessary*, to submit to arbitration, instead of commencing a suit at law.

Among the most prominent of these stand **INSURANCE DISPUTES.**

This may be accounted for when we read that anomalous instrument,—a Policy of Insurance,—which, if we may judge from our experience of the past, contains within itself a more fertile source of discord than any other legal or commercial act on record. On this

subject a learned writer has remarked, that
 “there is scarcely any contract which affords
 a greater number of questions of doubt and
 difficulty than that of Marine Insurance.”^p

^p Marshall, Pref.
vii.

It has been before observed, that the object of every one engaged in commerce, is to obtain a settlement of the disputes occurring in the course of his business, with as little delay and at as small an expense as possible. This, which may be considered as an axiom, could not fail to strike those who had the formation of codes of insurance law; and, accordingly we find, in those foreign compilations most worthy of attention, an article, directing “all differences arising between the parties to be referred to the chamber of commerce, of the city,” which appointed *arbitrators* to settle the dispute; and in all foreign countries having much external commerce, this is the practice of the present day. In England, up to the commencement of the seventeenth century, it was the custom to refer insurance disputes to the arbitration of merchants; but, nearly at the close of the reign of Elizabeth, an act was passed,^q by which the Lord Chancellor was enabled to grant a commission to certain persons to try all insurance causes; and, “to prevent delay,” they were authorized to proceed

^q 43 Eliz. c. 12.

as well out of term as in : but, as if the high officer from whom the commission was to emanate were jealous of the power given to this court, it was ordained, that if either of the parties were dissatisfied with its judgment, a right of appeal lay to the Chancellor himself. This would, it may be supposed, have been of itself sufficient to have defeated the intent of the law, (which was expressly made "to prevent delay,") without the intervention of another clause, which, if enforced, would probably, in a very short space of time, be the destruction of all the courts of law and equity in every country in Europe ; this was, the prohibiting the commissioners and officers of the court from charging or receiving any fee for their trouble ; and at the same time not appointing them any salary for their services. We cannot, therefore, be surprised, that "the Court of Policies of Assurance" did not answer the purpose intended ; nor that, either from its dilatory proceedings, or from the non-attendance of the commissioners, (both of which might have been anticipated,) it soon fell into disuse. Other reasons are given for this, but men in the habits of business will perhaps consider *these* as sufficient. In the preamble to the act, (made in 1601,) it is

stated, that before the passing of it, the settlement of these disputes was left to the *arbitration of merchants*. Thus, before this act, merchants were in England (as they had been in foreign countries for a long time previous thereto) considered the only expounders of the law and practice of insurance.

It is not the object of the author to particularize the various subjects of difference which grow out of the policy, and of the memorandum at the foot of it: most of which might, perhaps, with more probability of a satisfactory result be referred to arbitration, than (which is the only alternative^r) brought into a court of law. A few of these will be found treated of in the writer's "Essay on Average, and on other subjects connected with the Contract of Marine Insurance;" of the *fourth* edition of which the *first* edition of this Essay formed a part. While on this subject, in confirmation of the above, and of the truth of his preliminary remarks, he begs leave to relate a fact, which, a few years ago, came directly under his own notice. A cause was tried at Guildhall, at the sittings at *Nisi Prius*, which related to a claim on a policy. It being a new case, and therefore no law to overrule it, the verdict was left to the decision of the jury. It

^r Bro. Parl. ca.
525.

happened that this was composed of two or three special jurymen, and nine or ten talesmen; only one of the jury understood the question, the experience and knowledge of the others lying in a different direction. In consequence of which, instead of *twelve* men exercising their judgment and volition on the subject, as was their duty, and no doubt their inclination, the question was in reality decided by *one*; the other eleven concurring in his opinion, and which, it may be remarked, happened to be contrary to that of the judge. Such a case as this might perhaps, therefore, with greater propriety have been referred to the *deliberate* judgment of one, two or three men, known to be acquainted with the subject, than to the *prompt* decision of twelve, only one of whom knew any thing about it.* Similar cases to this have come under the author's notice, (even when it was not requisite to fill up the jury with talesmen,) but he forbears to trouble the reader more at length on the subject. He will only cursorily mention those subjects which could scarcely be settled any other way than by a reference to arbitration. Such are the following:—

* Ut supra, p. 1.

MATTERS OF ACCOUNT, either in partnership or otherwise.

CAPTAINS' ACCOUNTS.—"These," it has been judiciously remarked by a legal writer, "should not be allowed without vouchers; as the law entertains a very just jealousy of this species of contracts, in which the same person at once incurs and admits his own account; those who are in such circumstances, should be prepared to prove, by the most direct evidence, the absolute necessity of the charges incurred."^u We do not notice disputes between *Masters and Workmen*; because, by the provisions of the statute, (5 Geo. IV., c. 96,) they are excluded from being brought under the head of mercantile arbitration.

All **MONEY TRANSACTIONS**, in which the sum claimed or due is uncertain; *uncertainty* being the essence of arbitrament. For things which are in their nature *certain*,—such as a debt due on a bond, damages recoverable by a judgment of a court of law, and the like, cannot be submitted to arbitration; because in such cases the demand is already ascertained by law. But a matter certain, *with other things*, is arbitrable.^u

^u Rolle Arb. (R) 2, 3.

The advantages of referring to arbitration all cases of complicated calculations, must appear evident; and the learned judges who preside in our courts, always suggest the pro-

priety of such being adjusted out of court ; and it may be remarked that, contrary to former practice, they now give every possible encouragement to this mode of settling disputes, and put the most favourable construction on the award. In confirmation of which, we may quote the words of a late learned chief justice of the Common Pleas (Mansfield), who said, "the courts have sometimes been very strongly inclined against awards, as carrying away causes from their own jurisdiction, to the decision of private persons ; but they now give these instruments a more liberal construction."^w

^w 1 Taunt. 554.
Bar. Rep. 277,
2 Wils. 267.

CHAPTER III.

OF THE SUBMISSION TO ARBITRATION; OF THE MODES OF REFERRING; AND OF THE INSTRUMENTS OF REFER- ENCE.

THE SUBMISSION is the authority given by the parties at variance to the Arbitrators, empowering them to inquire into and decide upon the matters in dispute.

This may be made in various ways; but before we proceed, the writer begs leave to apologize in advance for deviating from the direct technical line, to state what he conceives to be the *origin* of referring disputes to arbitration.

The greatest privilege which every one possesses is to think, and (consistently with law and propriety) to act for himself, without controul or hinderance. This principle, which appears inherent in human nature, leads to a man's having what is called "an opinion of his

own'' ; which opinion, after being indulged in for some time, it is not too much to suppose *he* would imagine to be the *true one*. Now when, in the early ages of society, two men thus situated met, who were each equally well-disposed and each equally tenacious of his own opinion, and this opinion happened to differ on the subject of *property* ; it would seem natural that they should *agree* to leave that dispute to the decision of another, which *they* could not agree to decide themselves. This other, or third person, would be what we call (from the Latin) a referee, or an arbiter, or (from the French, *un père*) an umpire ; which in those days, and among those people, would be an aged man, (called father,)—for age was with them, as gravity was formerly with us, a mark of wisdom. However this might be, the fact is, that if some principle similar to this had not been established, civil society could not have had a permanent existence. It has been held by some persons, that an arbitrator could never be certain that he had done justice unless *both* parties were dissatisfied with his award. This may be said to carry the principle to the extreme point, but it nevertheless brings us to the *original* cause of each of the parties in a dispute choosing his own arbitrator,

(who would no longer be an *arbiter*,) and, foreseeing the probability that, as *they* had done themselves, these two might also differ in opinion, giving them leave, in case of such difference, to choose a third; who, joined with one of the other two (as *third arbitrator*), or by himself (as *umpire*), might finally decide the question.

We now come back again to the subject of this chapter. There are two principal **MODES** of referring disputes to arbitration; the most obvious, and the one *most in use*, is that made direct *by the parties* themselves; the other, which in many cases cannot be avoided, is through the *intervention of a court of law*.

The **FIRST** mentioned **MODE** of submission may be made in various ways, viz:—

1. That which has been just alluded to as the most natural and easy,—a **VERBAL AGREEMENT** between the parties to abide by the *verbal* opinion of a third person: which we only notice for the purpose of remarking, that this mode of reference is *legal*;^a for it can scarcely be supposed that any persons, commonly well-instructed, would resort to such an uncertain mode of settling a dispute when pen, ink and paper could be obtained.

^a 3 Buls. 311.
Kyd, 10.

2. The mode of Reference most resorted to in ordinary disputes arising out of *Money Transactions*, is that of **MUTUAL BONDS**.
3. By **AGREEMENT** on *unstamped*, or on *stamped* paper.
4. By **DEED** under seal.
5. By an Agreement on a Policy of Insurance; which, from the transactions of that nature being so numerous, is more in use than any other.

Thus we have seen that the **INSTRUMENT** of submission may be made by either of the foregoing modes, all of which are equally good in law; on which it may be necessary to remark,

First. That when a **PAROLE** Agreement is reduced into writing, it must, to make it legal, be on a stamp according to the nature of the matters referred.

Secondly. When by **BONDS**; it is proper that they should be prepared by a Solicitor or by a Notary, in the habits of business of this nature; and this, more particularly, as the *printed* form is (or was) very defective; as it does not contain the clause for making the submission *a rule of court*, nor that the *costs of the reference* shall be left to the discretion of the arbitrator.

To make the *third* mode by **AGREEMENT** (on unstamped paper) legal, it must, like the

first mode, have an Agreement or a Deed Stamp, according to the nature of the matters referred.

The *fourth* mode,—by DEED under seal,—must be resorted to when a question is pending relative to the conveyance of land, &c., and which must then be by *indenture*, with mutual covenants, to abide by the decision of the arbitrators.

To make the *fifth* mode, that is, an Agreement on a POLICY OF INSURANCE, available in law, it must have an Agreement Stamp, and the Award must have an Award Stamp; though it is not necessary that there should be a stamp for each sum subscribed by each underwriter; for it has been held that they have such a community of interests in the subject insured, that if they all agree to refer a demand, one Stamp for the Agreement is sufficient, and one for the Award.^b

^b 6 Taunt. 171.
1 Marsh. 525.

The terms of all these modes of submission must vary according to the matters and things referred; the *instruments* all require *much caution* in the preparation, “to guard against inconveniences, which it seems from different decisions have occurred, for want of *proper terms* having been inserted in the agreement of reference.”^c

^c 2 Chit. Prac. 88.

So much for the submission to reference by

the *parties themselves*. The SECOND MODE, viz. that through the intervention of a judge, is either by RULE OF COURT, at the sittings at *Nisi Prius*, or by a JUDGE'S ORDER. Of the *first* there are two kinds:—the *one* by consent of the parties, through their counsel, during the trial of the cause, for the purpose of ending the suit without the risk of a verdict; when a juryman is agreed to be withdrawn: the *other*, for the purpose of ascertaining the damages; when a verdict is recorded for the plaintiff, subject to a reference.

The submission by a *Judge's Order*, is resorted to when a suit has commenced, and before going to trial; but this does not necessarily imply a stay of proceedings in the cause, and they may go on, unless it be expressed in the order, that all 'proceedings shall cease.'^p

^d 2 Lord Raym.
789. Kyd, 20.

The writer does not think it proper, in a limited work of this nature, to give the *forms* of Bonds, Agreements, Deeds, &c., but contents himself with referring the reader to the legal authors mentioned by him in his Preface, and more particularly to Mr. Chitty's Practice of the Law, Vol. II. pp. 88—90; and to the late Mr. Bythewood's Precedents in Conveyancing, Vol. II. pp. 594, &c. And it is the less necessary for him to give these forms, because,

if the matter in difference be of sufficient consequence to require a regular legal instrument, it will be always advisable (as mentioned above) for the parties to employ a legal man to draw it up.

It is now proper to notice the subject alluded to in the *Preliminary Remarks*, and which cannot be so well done in any other way, as by quoting the words of one of the learned authors mentioned in the Preface ; which quotation and the remarks relating to the statute before alluded to,^e are particularly ^{c. 9 and 10 W. 3, c. 15.} worthy of the reader's attention :

“ In aid of an object recently declared by the Legislature to be conducive to *SPEEDY justice and diminution of expense*, arbitrations may with propriety be greatly extended in practice, viz. *by having the facts stated concisely by the arbitrator, and then obtaining the opinion of the Court thereon, without the expense of pleadings or trial.* The recent acts for the further amendment of the law enable parties to any action or information, *but not until after issue joined*, by consent and by order of any of the judges of the superior courts, to state the facts of the case in the form of a *SPECIAL CASE* for the opinion of the Court, (but without the power of feigning a *special verdict*,) and to

agree that a judgment shall be entered for the plaintiff or defendant, by confession or of *nolle prosequi*, immediately after the decision of the case, or otherwise, as the Court might think fit.^f Before that enactment, no such special

^f 3 & 4, W. 4, c. 42, § 25.

case could be stated until *after* the expense of a trial had been incurred, and it was considered culpable in any practitioner, even to attempt to obtain the opinion of the Court by a *pretended*

^g 3 B. and Cres. 507.

special case.^g But at all times since the statute 9 and 10 Wm. III., c. 15, or when a submission has been made a rule of Court, an *award* may find facts specially, subject to the opinion of the Court, and who will, after argument, determine upon the same;^h and consequently,

^h 2 Bos. & Pul. 372.
ⁱ Taunt. 637.
^j J. B. Moore, 713, S. C., et alia.

before issue joined, and *before even the commencement of an action*, parties may, by *any memorandum in writing*, submit their differences to arbitration, with an express clause that such submission *shall* be made a rule of Court, and that the arbitrator *shall* by his award find the facts, and state any objection or point of law arising upon the evidence specially, and make his award, so that the opinion of the Court may be thereupon obtained *without the expense* of any process or pleadings; and such a proceeding is strongly recommended to parties, who may justly repose confidence in a barrister.

ter's faithfully stating the facts with his opinion, subject to the decision of the four Judges, although they might not choose to be bound by the opinion of any single individual."⁴

⁴ 2 Chit. Prac. 78.

Thus it has been seen that, by those of the foregoing modes of reference which are in *writing*, it is in the power of the parties to agree that the submission shall be made *a rule of any of his Majesty's courts of record* which they (the parties) shall choose;⁵ except in a case where the matters referred have been previously made the subject of an indictment. But the submission to refer by *parole* cannot be made a rule of court, because the words of the act are, that the parties shall "insert such their agreement in their submission."⁶ The use of *this agreement* is, that on either of the parties refusing to submit to the award, the court in which the submission is recorded will, in general, on application being made by the other party and the usual affidavits put in, issue an attachment to compel the performance, which will be made absolute, if there be no motion for a rule to shew cause against it; though in all cases it is discretionary with the court to grant an attachment,⁷ as the party may have his remedy in an action on the award. The submission may also be made the rule in

⁵ Stat. 9, 10, Will. III. c. 16. § 1.

⁶ 7 Term Rep. 1.

⁷ 1 Strange, 695.
1 Bur. 278.
1 Saund. 326.

^m Anstr. (Rep. Ex.) 273.

a court of equity ;^m and the court of Chancery will compel by attachment the performance of an award made in pursuance of such submission.ⁿ It is therefore advisable for the benefit of both parties, whose object must or ought to be, on entering into a reference, that the matters in dispute shall be decided and finally put to rest, that this clause should always be inserted in the instrument of reference. But in regard to the last mode of reference, that by a *judge's order*, it has been held, that it is not absolutely necessary that the rule should be made of the same court in which the suit is pending.*

It should be borne in mind that, according to the statute, it is the *submission* and not the award which is to be made a rule of court ;^o and that this may be done at any time, (if the courts be sitting,) that is, before the arbitrators commence the investigation, during their proceedings, or after the award is made ;^o but, for reasons mentioned in the next chapter, it is better that it should be done *as soon as it is practicable* after the agreement is perfected. (1)

^p 2 Barnardist. 162. Str. 1178.
³ East, 602.

^q 6 Vesey, 10.

(1) The liberality of the courts in their construction of agreements of reference, cannot be better exemplified than in the following case : where the agreement to make the submission a rule of court did not appear in the *condition* of the bond, but was written at foot, without being signed, the court did not refuse the rule, considering the intention of the parties to be what

^r Barnes, 55: the writing purported.^r

This statute, which by making the process summary, prevents litigation, and which must be so peculiarly beneficial when generally known, was not, however, obtained without a struggle; for as near to our own times as those of Charles II. the courts were reluctant to grant their interposition,—such a domestic tribunal interfering too much with their legal habits; for it is said, that in more instances than one, a judge on the bench,—alluding to references by order of *Nisi Prius*,—has been heard to declare, that he never knew any good to arise from them.*

* Kyd, 21.

In those cases indeed, where from the nature of the business the greatest number of questions for reference occur, viz.:—on policies of insurance, it is not customary to insert this clause; perhaps, because such are generally considered as friendly references, and by giving a legal turn to the thing it might have the appearance of intended litigation. Instances have, notwithstanding, come under the author's notice, when such a clause might have been found useful.

In all agreements of reference, *where the provisions of the statute have been complied with*, it is *imperative* on a court of law or equity, to enter the submission on its record;

which is materially different from what might be inferred, from some bonds and agreements of reference drawn up even by lawyers and notaries, in which it has been made *optional* with the court,—the words of the agreement being, “if the court shall so think fit,” or “if the court shall so please;” which can only appear with propriety in a judge’s order of reference, or in one by rule of court—such references, (*i. e.* while an action is pending,) not coming within the operation of the statute.[†] In an ordinary *agreement* of reference these words can only tend to mislead.

It is customary in *articles of partnership* to make a provision, “that all disputes between the parties relative to their intended transactions in business, shall be referred to arbitrators indifferently chosen,” &c. Such a clause is useless. The general principle was settled, in a case where a clause was inserted in a policy of insurance, that “if any dispute should arise between the parties it should be referred to arbitration;” this was held by the court to be nugatory; for without it, the parties might, if they thought proper, submit their differences to arbitration, and with it, neither could compel the other to do so: but in this case the court was of opinion, that if a reference had

[†] 2 Ves. Jun., 453.

actually taken place and been determined, or even if there had been a reference depending, this might have been a bar to the action,¹ though the mere agreement of the parties could not exclude the jurisdiction of the court.² For it has been frequently determined, that the authority of the supreme courts of Westminster is such, that nothing but the express words of an act of parliament can take away or abridge their jurisdiction.³

^v 2 Bos & Pul. 135.

^u 2 Hawk. P.C. 287.
 2 Bur. 1042. 8
Term Rep. 130 6
 Ves. 818. et al.

It is not (as has been said,) the author's intention to give forms or precedents of agreements of reference, of bonds of arbitration, &c.; but it may be necessary to remark, that the condition of the obligation, (or that part of the instrument of submission which gives the power to the arbitrator,) should be as concise as possible, and it is said from authority, that "any words, by which the intention of the parties can appear, are sufficient to make a condition of an obligation."^w The only form which it is thought necessary to give, is that of a reference on a policy of insurance; which in general is as follows:—"We, the undersigned, "do hereby agree, to refer all matters in dispute on this policy, to the opinion of A. B. "and C. D., with leave for them to choose a

^w 1 Saund. 65.

“ third person, should they think it necessary ;
 “ and, we also agree to abide by their decision,
 “ or the decision of any two of them.”
 “ Lloyd’s, day of” *Signed* by the
 assured, or by the broker for him, and by those
 of the underwriters who may choose to refer
 the matters in dispute to arbitration. The
 award is in general, in the following or similar
 words:—“ We, the undersigned, are of opi-
 “ nion, that the underwriters ought to pay the
 “ sum of £——— per cent. in full for all claims
 “ on this policy, and cancel their subscrip-
 “ tions.” *Signed* by A. B., C. D., &c. It is
 evident, however, that every particular refer-
 ence must be worded according to the matters
 in difference, and, if *all* claims are not referred,
those which are, must be specified.

It is customary, in references made through
 the intervention of a court, to limit the time
 for making the award to some one day in the
 following term ; and if the arbitrator wishes it
 to be prolonged, application must be made to
 the court, or the judge, for further time. But,
 in ordinary bonds and agreements of reference,
 the arbitrator is allowed to enlarge the time to
 any day he may think fit, by indorsement on
 the instrument ; and it is understood, that this

clause in the agreement, though it may be worded so as to enlarge the time only once, shall be interpreted to extend to more than once; on this question one of the late chief justices of the Common Pleas (Mansfield) said, "the sense of the condition is,—that he shall have sufficient time to make his award, and that if he cannot make it by the day named, he is to make it at any time he pleases; and whether he names the ultimate day at once, or at a subsequent time, is immaterial."² And, it may also be proper to remark, that when the time is enlarged from — until —, the award may be made *on* the last mentioned day.³ The time for making the award ought, indeed, never to be *fixed* in the instrument of reference, whether the arbitration be by rule of court or by the ordinary mode. One of the judges of the court of King's Bench lately said,—"this term ought *never to be inserted in orders of reference*, but it should be left to the discretion of the arbitrator alone, to enlarge the time as he may require."⁴(1) In all cases, where the time is not limited, a reasonable time is

² 1 Taunt. 509.
⁴ id. 638.

³ 3 Br. ch. ca. 58.

¹ 1 M. & Sel. 1.

(1) It is not necessary to state in an award the having enlarged the time, for the day to which the time for making an award is enlarged is immaterial and need not be proved.⁵

⁵ 1 Goss. 5.
² Saund. 290.
³ Pri. 54.

always understood; but on this subject we refer to the next section.

Much has been said in the courts of law and equity, and quotation might be heaped upon quotation if necessary, on the subjects of *umpires* and *umpirages*, but as these terms are almost unknown, and are certainly not now used in *mercantile references*, the author will spare the reader and himself the trouble of going into the detail. The custom is now, for each of the parties to name an arbitrator, and for the two arbitrators to choose a third; and the words in the agreement usually are,—that “the award shall be made by them the said arbitrators, or any two of them;” thus, the whole of the three retain their authority until the award is made; but an *umpire* is in the nature of a judge between the two original arbitrators; which, to say the least of it, is an obnoxious office; the third arbitrator is chosen to assist the other two, and, if they differ, to bring the matter to a close by signing the award with either of them.

The **MODE** of Reference, according to the French law, is, like the **SUBJECTS** allowed to

be referred, more *limited* than ours ; for their *Code de Procédure Civil* (art. 1005) thus briefly expresses it :

“ Le compromis pourra être fait par procès-verbal devant les arbitres, ou par acte devant notaire, ou sous signature privée.”

It is only necessary to add, that, as with us, the instrument must be stamped before it can be made available in law.

CHAPTER IV.

OF THE REVOCATION OF THE INSTRUMENT OF REFERENCE.

EVERY kind of authority is in its nature revocable, though even *intended* to be made irrevocable by the express words of the agreement.^a But the instrument of revocation must be of as high a nature as the submission itself;—for instance, if the submission be by deed under seal, the revocation must also be by deed;^b if the agreement be in writing, it cannot be discharged by word of mouth; according to the general principle of law, that every power, authority or obligation must be discharged with the same solemnities and formalities with which it was constituted; and therefore, if the submission be verbal, the revocation may also be verbal;^c and in such a case one of the parties saying to the arbitrators,—“I discharge you from proceeding any further,” will be sufficient to revoke their authority.^d

^a Dig. l. iv. t. 8,
§ 27.

^b 5 Co. 26.
Brownl. 62.

^c 2 Keb. 64, 79.

^d Kyd, 30.

If the submission be by bond, with a penalty, it is forfeited by the party who revokes the submission.^e But, in case the time is not limited in the bond, and a considerable portion of time has elapsed, during which (from the nature of the case,) the arbitrator might have made his award if he had so chosen, then, it is material to know,—that if either of the parties shall give him notice in writing, to the purport, that if he does not make his award within a reasonable time after such notice, he (the party) will revoke his submission,—he who gives such notice is not bound by the award, if made after a reasonable time has elapsed, and a notice of revocation has been given in consequence, nor nor will a forfeiture be incurred of the penalty on the bond.^f

^e Dig. l. iv. t. 8.
^f 30.
 3 Keb. 745.
 7 East, 607.

Though one of the parties to an agreement of reference revoke his authority, the arbitrators are right in afterwards proceeding to an award; because the party continuing in submission is entitled to his action for damages for non-performance of the covenant to abide by the award.

^f 2 Keb. 10, 20.
 3 M. & Sel. 145.

Before the recent act, (3 & 4 W. IV. c. 42,) it was held that the submission might be revoked at any time *before* it had been made a rule of court; but now, by sect. 39, it is enact-

ed that the power and authority “ of any arbitrator or umpire appointed by, or in pursuance “ of any rule of court, or judge’s order, or order “ of *Nisi Prius* in any action now brought, or “ which shall be hereafter brought, or by or in “ pursuance of any submission to reference “ *containing an agreement* that such submission “ shall be made a rule of any of his Majesty’s “ Courts of Record, shall *not be revokable by* “ *any party* to such reference without the leave “ of the Court, by which such rule or order “ shall be made, or which shall be mentioned “ in such submission, or by leave of a judge ; “ and the arbitrator or umpire shall and may, “ and is *hereby required* to proceed with the “ reference, notwithstanding any such revocation, and to make such award, although the “ person making such revocation shall not “ afterwards attend the reference.”

It is to be remarked that this statute does *not absolutely prohibit a revocation, but only requires* the leave or sanction of the court or judge to such a proceeding. And as before, so still since the act, there may be cases when perhaps even without previous leave a revocation might be given effect to, although in all respects the submission were perfect under the act. ^g

The above applies to the submission *before* it has been made a rule of court,—but after that, the party cannot rescind it without incurring a breach of that rule.^h This is a good reason for making an agreement of reference a rule of court as soon as is convenient, or the courts shall sit, after the execution of it.

It is a general rule, that the authority given by any man ceases at his death ;ⁱ if therefore, one of the parties *die* while the reference is pending, that is, before the award is delivered, the submission is vacated,^j which accords with the maxim in regard to suits at law,—*actio personalis moritur cum persona*. But the court of Appeals has decided, (in a late case,) that “if men who submit to arbitration, in the instrument of submission bind *their representatives*, in a case where the action would survive to or against their representatives, although one or both of the parties should die before the award be made, the arbitrators may proceed with the reference.”^k But, (as it regards the death of one of the parties,) if a verdict be taken subject to a reference, to determine the amount, such reference being authorized by an order of *Nisi Prius*, and subsequently made a rule of court, though one of the parties should die while the reference is pending, the award is

^h 7 East, 607.

ⁱ Dig. 1. 4. t. 8.

^j Barn. 210.
¹ Marsh. 366.
² B. & Ald. 394.

^k Knapp. Rep. 83.
101. (1829)

to be considered as having relation back to the time of the verdict, and is valid ; (1) for the principle is this :—by consent of the parties, an arbitrator is, at *Nisi Prius*, substituted in the place of the jury ; and when an award is made, the verdict must be entered so as to correspond with that award ;^m and the true meaning of a *rule of reference* is, that the parties consent that the arbitrator should mould the verdict which has been taken ; and that the verdict so moulded by him, shall be taken to be the verdict which the jury should have found.ⁿ The verdict is therefore taken *pro forma* subject to the award of the arbitrator.^o

^m 3 B. & Pul. 244.
ⁿ 7 Taunt. 574. n.

ⁿ *Idem*, *ib.*

^o 7 Taunt. 571.

If an unmarried woman submit to arbitration, *her marriage* operates as a revocation of the submission, not only on her own part, but on that of any other person who may have joined with her in the reference ; for marriage is in law a civil death of all the woman's rights.^p

^p 2 Keb. 885.
 W. Jones. 308,
 308. 4 B. &
 Ald. 250.

(1) The courts of King's Bench and of Common Pleas have been at variance in their decisions on this subject. There appears to be no doubt that the death of one of the parties operates as a revocation, *where no verdict is taken, but merely a juror has been withdrawn*. But in the case of a verdict being taken subject to reference, the court of King's Bench was of opinion that an award made after the death of the party was good in law.^q

^q Cald. 30.

The *Bankruptcy* of either party is not necessarily a revocation of the arbitrator's authority to proceed and make his award, at least so as to bind the bankrupt and his opponent.*

But in case the assignees should, before the award has been made, give notice of their dissent to any further proceedings in the reference, or if they should forbear to attend the arbitrator, it would seem that a subsequent award would not be conclusive against the estate;† though if the assignees should adopt the arbitration, they will then be bound by the award.‡

* Chft. Rep. 46.
4 B. & Ald. 250.

§ 3, Sim. 143.
1 Ross & M. 153
S. C.
17 Ves. 241.

‡ 9 B. & Cres. 659.
4 B. & Ald. 25.
2 Chit. Prac. 104.

When *assignees* have agreed to refer, the recent act* provides that the agreement of reference may be made a rule of the court of Bankruptcy.

* 1 & 2 W. 4. c.
56 § 43.

The death of the *arbitrator* will determine all power to proceed, unless the submission should provide otherwise.†

† 4 J. B. Moore;
De la Bill. c. 1 §.
9 § 1, C. de P. civ.
1012.

By the French law the submission can only be revoked by the parties themselves agreeing to do so.‡

‡ C. de P. civ.
art. 1008.

CHAPTER V.

OF THE PROCEEDINGS OF THE ARBITRATORS.

AFTER having appointed the *place* of meeting, the first sitting is generally occupied in reading the Instruments of Reference ; in ascertaining that they are worded correctly ; that they contain all the necessary clauses, among which ought to appear—1. for *making the submission a rule of court* ; 2. for *the costs of the reference being in the discretion of the arbitrators*. In regard to the *first*, it may be absolutely necessary, (as we have seen,) to guard against the power of *revocation* by either of the parties, that the submission should not only *contain this clause*, but that the clause itself should be *acted upon* at as early a day as possible after the execution of the agreement, to guard against the death, or absence, or refusal

of witnesses to make the requisite affidavit; and it may be proper to remark, that the submission may now be made a rule of court in *vacation* as well as in term.^a *Secondly*, as to the costs of the reference,—where nothing is said in the submission by whom the costs of the *award* are to be paid, it would appear that each party must pay an equal proportion.^b But when a cause is referred by rule of court or by a judge's order, the power of awarding costs is necessarily consequent on the authority conferred upon the arbitrator of determining the cause. It is, however, usual in referring causes, to provide that *the costs shall abide the event of the award*, in order that the arbitrator may not have it in his power to withhold costs from the party who is in the right.^c But where the order of *Nisi Prius* is *silent* on the subject of costs of *the reference and award*, the arbitrator has no power to adjudicate upon them.^d In mercantile arbitrations it is customary to insert a clause, that "the costs of the reference and of the award shall be in the discretion of the arbitrators."

^a 5 B. & Ald. 217.
Tidd, 836.

^b 1 Taunt. 165.

^c 2 T. R. 634.
12 East, 107.

^d 9 Bing. 570.
2 M & Scott, 725.
1 Dowl. 721.

The next proceeding is (when, as usual, leave is given to that effect in the agreement,) to appoint a third arbitrator, and it is some-

times made *imperative* that this shall be done before the commencement of the proceedings. But whether it be imperative or not, it is always *advisable* that the third arbitrator should be chosen before an opportunity occurs of any difference between the two named in the agreement. The courts of law consider this as the fairest mode, and recommend it accordingly.^e Besides which, the propriety cannot be questioned of the third arbitrator hearing the evidence from the commencement with the other two. But when the *umpire* was appointed before the parties differed and the award was *signed by all*, it was held to be, in legal operation, the award of the *umpire*. It often happens, however, that there is some difficulty in determining on *who* shall be the third person, each arbitrator of course wishing to have the one of his own nomination: in such a case, it is the custom for each to write a name on one, two, or three slips of paper, and draw lots for the person. *Three* cases which bear upon the subject are reported in the law books; in two, the mode adopted of choosing a third arbitrator (or umpire) was held to be bad, but in the third, (the difference between which and the other two is scarcely perceptible,) it was considered as good. In the *first* case, the tossing

^e 2 T. R. 64.
9 B. & Cres. 407.

up a piece of money to ascertain *which* arbitrator should name the third, was held to be bad; *f* 2 Vern. 465.

Of the *other two* cases, which are more modern, —one was in the Common Pleas and the other in the King's Bench: in the former, the drawing lots for *which* should have the nomination of the third person, was also held to be bad; *g* 2 B. & Ald. 218. the other case, where the appointment was considered by Lord Ellenborough to be good, is as follows:—The arbitrators named different persons, but each preferring the one named by himself, though not disapproving of the other, they determined to toss up which of the two nominees should act, and the person upon whom the lot fell, together with the arbitrator who had named him, made the award, without the other first-named arbitrator joining in it.—Lord Ellenborough said, “this is not a tossing up between the two arbitrators *which* should nominate the third, in exclusion of the other, which would have been bad, according to the cases cited; but, after having each of them nominated one, and each of them thinking that the nominee of the other was nearly as proper as his own, they agreed to submit their opinion to this mode of selection of one, out of the two, *fit* persons. I cannot see any objection to this. The mode of appointing twelve jurors, out of

^h 16 East, 51.

all those who are returned to serve, is by lot.”^h
It appears, therefore, that the award is not good in law, if the two arbitrators toss up, or draw lots for the nomination of the third, but that *it is*, if they each name one, and then draw lots which shall be appointed. On the first case cited, the judge observed, that the choice ought to be fair and impartial, and ought not to be left to chance; it should be an act of the will and the understanding, but in the case of drawing lots or tossing up *who* shall name the third, the arbitrators follow neither.ⁱ

ⁱ Kyd, 76.

In general, however, the appointment of a third arbitrator or of an umpire, ought to be the *result of the exercise of sound discretion and mature deliberation, and not of chance.*^j

^j 3 B. & Adolp.
248.

^k 3 B. & Cres. 407.

This is now confirmed by the following decision of the court of King’s Bench (1830):
“The appointment of a third person as umpire must be the act of the will and judgment of the two arbitrators; matter of choice and not of chance, unless *the parties* consent to or acquiesce in some other mode;—where, therefore, the appointment was by drawing lot, out of four, each arbitrator naming two, the court set aside the award.”^k

^k 9 B. & Cres. 626.

These preliminaries being settled, the appointment ought to be indorsed on the instru-

ment of reference,⁴ which appointment, it is ^{17.} ⁴ Camp, N. P. C. scarcely necessary to say, does not need an additional stamp, though this, as relates to the appointment of an *umpire*, was till lately doubted.^m

^m 4 Taunt. 704.
Kynd, vii. 2 ed.
Sty. 459.
4 East, 584.

The form of the appointment ought to be as follows :

“We, A. B. and C. D., the within-named arbitrators, do by virtue and in pursuance of the powers within contained and in us vested, hereby nominate and appoint E. F., of London, merchant, the third person or arbitrator (or umpire) within-mentioned, he having been selected and chosen by us for that purpose, to act, decide and award as within directed.

Witness our hands this — day of —.”ⁿ

ⁿ 2 Chit. Prac. 93.
& 2 Byth. Pre. 593.

A. B.

C. D.

The next step is, to send notices to the parties, or their solicitors, to attend on a certain day and hour, with their witnesses and their documents. At that meeting, the first thing usually done, is to ~~examine~~ the *jurats*, and see that the witnesses, and the parties, (if necessary,) have been regularly sworn according to the terms of the order, or the agreement of reference. If the arbitration be by *rule of court*, or a *judge's order*, the oath must be made

o 1 41.

before one of the judges of the same court by which it is issued; but if the submission be under the statute, *i. e.* by deed, or bond, or agreement, containing the usual clause, and the provision be not made for the oath to be taken before a judge, then *it may be administered by the arbitrators themselves*, who are by the late act (3 & 4 Wm. IV. c. 42) duly authorized to administer an oath;^o and this includes those witnesses who may not have been sworn at the sittings of *Nisi Prius*. This act (which is made expressly “to render references to arbitration more effectual,”) enacts, that when in any *rule* or *order of reference*, or in *any submission* to arbitration, containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be *examined upon oath*, then the arbitrator *may administer an oath* to each witness, or take his affirmation; and *in case of false swearing*, the crime of *perjury* shall be deemed to have been committed. In these cases the proper oath or affirmation is to be administered to the witness verbally, as at *Nisi Prius*, and merely in the same form, excepting that the arbitrator, instead of the officer of the court, is to require the witness to take into his hand the proper book, (*i. e.* the New

Testament, if a Christian, and the Old Testament, if a Jew;) and the arbitrator is to repeat these words:—"You shall true answer make to all such questions as shall be asked of you by or before me, touching or relating to the matters in difference referred to my award, (or to the award of myself and C. D.,) without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God."

After which the witness, after signifying his assent, is to kiss the book, which completes the swearing.

As, under this act the witnesses will certainly be *indictable* if guilty of perjury, the evidences, whether in examination or cross examination, when any case of perjury is *apprehended*, should be carefully taken down in writing in the form of questions and answers; and, when concluded, the witness should read over the same, or it should be read to him, and he should be asked by the arbitrator whether it is correct, and whether he would wish to add any thing; and the further questions and answers should be also written down; and then the witness should sign the statement. And the solicitor for each party should take and

keep a duplicate, and the original should be retained by the arbitrators.²

² 2 Chit. Pr. 100, 101, 102.

It may be necessary to remark that the parties and witnesses, while attending an arbitrator appointed by a court of law or equity, are free from arrest by civil process.³ And, by parity of reasoning, it is also so, *when the submission has been made a rule of court* in pursuance of the statute of 9 & 10 Wm. III.

³ 5 Ves. 350.

¹ Chit. Rep. 679.

² East, R. 89.

³ Bar. & Ald. 252.

For the proceedings of the arbitrators after this, of course no rules or precedents can be given, as they must entirely depend upon the good sense and judgment of the arbitrators, and the nature of the subject referred. But it may be well to know, that an arbitrator is bound to examine the witnesses on both sides, and in the parties' presence, *if required*, or the award will be set aside.⁴

⁴ 4 Pri. Ex. 432.

The meeting may be adjourned from time to time at the discretion of the arbitrators; they taking especial care that the award is made before the time limited by the agreement, or the prolonged time as enlarged by themselves, has expired. Here it is necessary to observe, that the signatures to the prolongation of the time should be witnessed; because the fact must be verified, before the court will grant an attach-

ment for non-performance of an award,[‡] and the witness must make *affidavit* to this fact; the affirmation therefore of a Quaker, it is said, would not be considered sufficient to ground an attachment for non-performance of an award.[‡] If the time for making the award be not limited, a *reasonable* time is always assumed, and what is a reasonable time is in the breast of the arbitrators.

[‡] 8 East, 12.
1 Marsh. Rep.
579.

[‡] Tidd. Prac. 831.

Should either of the parties refuse to attend the meetings of the arbitrators, after due notice given to him,(1) the proceedings may go on *ex*

(1) It is absolutely necessary to be generally known that any person, (*party or witness*,) will, by the late act, incur and suffer the penalties of a *contempt of court* by non-attendance on the arbitrators after being *regularly* summoned for that purpose. The words of the act (section 40) are as follow:—

“When any reference shall have been made by any such rule or order, (as aforesaid,) or by any submission containing such agreement, (as aforesaid,) it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement; or for any Judge, by rule or order to be made for that purpose, to *command the attendance and examination of any person* to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a *contempt of Court*, if, in addition to the service of such rule or order, an *appointment* of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire before whom the attendance is required, shall also be served, either together with or after the service of such rule or order; provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct money and payment of expenses,

^v Ca. L. & Eq. p. 2, 63. *parte*;^v but as this obnoxious step ought not

to be taken hastily, it should be carefully ascertained that the party absenting himself has been duly served with a notice in writing of the place and time of meeting. It is reported to have been said in court by Lord Hardwicke, that arbitrators are not bound to give notice to the parties of the time and place of meeting.”^u

^u 3 Atk. 529.

But this doctrine is so unreasonable, that there is no doubt that an award made, without due notice being given to the parties, of the meetings of the arbitrators, would now be set aside; and so would an award made by two of the arbitrators, without giving the third an opportunity to be present, and without giving him due notice of their meetings.”^w

^w Barnes, 57.

In regard to the examination of witnesses it is held that an arbitrator may, *bond fide*, conduct the arbitration in the manner he thinks proper; it is therefore no just ground of *revocation*, that he had *excluded* the parties and their attornies,

“and for loss of time, as for and upon attendance at any trial.
 “Provided also, that the application made to such Court or
 “Judge, for such rule or order shall set forth the county where
 “such witness is residing at the time, or satisfy such Court or
 “Judge that such person cannot be found. Provided also,
 “that no person shall be compelled to produce, under any
 “such rule or order, any writing or other document that he
 “would not be compelled to produce upon a trial, or to attend
 “at more than *two consecutive* days, to be named in such
 “order.”

and examined the witnesses privately. At all events, the parties having given no notice *to rely on the objection*, but going on afterwards with the reference, could not avail themselves of it.^z

^z 2 Car. & P. 575.

The last meeting of the arbitrators is, for the purpose of giving instructions for drawing up the award, which will be treated of in the following chapter. But before we conclude this, a few words may be said on the fees of the arbitrators; or, as they are technically called,—*the costs of the reference*,—though these include also the charge for the award, which is always drawn up, (or ought to be,) by a professional person^y *employed by and paid by the arbitrators*.

^y Ut sup. p. 28.

[*Arbitrators' fees*, like those of barristers and physicians, are strictly gratuities; and like those, they cannot be sued for; it being a general rule in law, that recompense cannot be demanded unless previously stipulated for. A solicitor may charge for his attendance, advice and trouble; an accountant for work and labour, and business done; but, (as it has been laid down by an eminent Scotch judge,) “the office of an arbitrator is absolutely gratuitous,—for an arbitrator is selected for integrity, impartiality and ability, which cannot be appre-

ciated, and do not therefore admit of recompense ;” and this is now the law of Scotland.^r]

^r Parker not. arb.
71. 116.

This is also the law of England, for Comyn says, “an action will not lie for business done as an arbitrator, unless there be an *express promise* to pay him a sum of money for his trouble.”^s

^s Com. on Con.
388. 4 Esp. 47.
^t Wat. Arb. C. 4.
§ 5.

It is indeed said,^b that the arbitrator may apply to the court for an attachment to enforce payment of the costs of the arbitration ; but the courts are unwilling to bring arbitrators into a court of justice.^c

^c 1 Bos. & Pul. 93.

It also would appear, where there is an *express promise* to pay the arbitrator a remuneration for his trouble, that an action would lie by him for the same ;^d although it has been ruled at *Nisi Prius* that there is no *implied promise* to pay the arbitrator a compensation for his trouble.^e

^d Sty. 465.

^e 4 Esp. 47.

This is, therefore, a sufficient reason for a clause to the following purport being always inserted in the bond or agreement, viz.—“the costs of the reference shall be in the discretion of the said arbitrator, (or ‘the said arbitrators, or any two of them,’ as the case may be,) who shall direct and award by whom, and to whom, and in what manner, the same shall be paid.”^f

^f Ut sup. p. 40.

For a general reference of all disputes, differences and demands, does not confer on the arbitrator a power to award “the costs of the re-

ference,"^g as they cannot be brought under the head of "disputes, differences, or demands" between the parties previous to their entering into it.^h It was formerly held, that if the award were of the costs of suit and of the reference, then *only the costs of suit* could be taxed, because the master could not judge of the costs of reference;ⁱ but it is now determined, as far as relates to references by order of *Nisi Prius*, (and it ought to be so in all others,) that an arbitrator has not an unlimited power to charge what he pleases for his trouble; for, if his charge be excessive, the court will interfere, and direct the master, or the prothonotary, to allow what is reasonable; otherwise, as the court observed, "an arbitrator would be judge in his own cause, which could never be admitted."^k The word "costs," when expressed generally in an order of reference, that they "shall abide the event of the award," applies to the costs of the reference, as well as to the costs of suit;^l and if no directions be given by the arbitrator respecting the costs of the reference, they are to be paid by both parties equally.^m The practice is, for the notary or the solicitor, who is employed by the arbitrator, to give notice to the party whom he (the arbitrator) may determine shall pay the charges of re-

^g 7 Term. R. 213.

^h 5 Willes, 62.
Barn. 58.
Styles, 459.

ⁱ Barn. 58.
Kyd, 135.

^j 3 Taunt. 461.
⁵ Id. 243.

^k 9 East, 436.

^l 1 Taunt. 166.
et ut sup.

ference, to take up the award, and it is held by him, (the notary or solicitor,) until the charges are paid. The party who takes up the award, is generally the one who is to be benefited by it, or in whose favour it is made.

A few words more may be said on the *costs*. In a late cause it was determined, that where, on a submission by rule of court, the costs of the cause were by the order of reference to abide the event, but the costs of the reference, and of *the special jury*, obtained upon the motion of the defendant, to be in the arbitrator's discretion; the court held, that the meaning was,—that the arbitrator should have the power of allowing the costs of the special jury as costs in the cause, if the party *who moved for the same* should succeed.^m In another case, where the costs were to abide the event, the arbitrator directed certain acts to be done, but awarded no damages, and that each party should pay his own costs and a moiety of the award; it was held that “the event” meant the *legal* event, and the arbitrator having awarded no damages, he could not give any directions as to the costs.ⁿ

^m 1 Sel. & Barn.
662.

ⁿ 1 Ch. (K. B.)
183, & vide 3 T. R.
130.

We have thus spoken of the *powers* and of the *duties* of the arbitrator, except his last and *principal duty*, which will be treated of at

length (and necessarily so,) in the next chapter. But before we close this, it may be proper to say a few words concerning *the proceedings against the arbitrator* for misconduct or misuse of the power intrusted to him ; which is apparently so great and so unlimited (regarding the affair of which he is constituted the judge,) as to be almost above controul. It is pleasing to remark, for the sake of humanity, that either from the unfrequent occurrence of a dereliction of duty, or from other causes, no direct case appears in the law books of the punishment of the arbitrator for misconduct or malpractices in the course of his vocation.^o It is, indeed, said, ^o *Ut infra*, C. VI. that “*if* combination be proved against an arbitrator, a court of equity *will* decree him to pay costs.”^p And again, “*if* a party be guilty of misconduct in making his award, he is *liable* to be made a defendant to a suit in equity, which, generally speaking, would be *severe enough punishment* for any ordinary delinquency.”^q

^p 2 Ves. J. 453. .
² Atk. 306.

^q Wat. Arb. c. 4.
§ 5.

The court, however, will always be disposed to view an arbitrator's conduct in the most favourable light ; and, unless a clear case of corruption and partiality be made out against him, they will order his name to be struck

out of a bill, to which he has been made defendant."

r 2 Atk. 395.
3 Atk. 644.
2 Vern. 380.
2 Ves. & Bea.
364.

s 9 Bing. 605.
2 M. & Scott, 740.
1 Dowl. 723.
& ut infra.

As to *publishing* the award, the *notice* of its being ready for delivery on payment of the charges is sufficient."

Arbitrations in *France* are conducted nearly in the same manner as with us, making allowance for the difference of habits. There, it is customary to hold their sittings in the house of the *oldest* of the arbitrators; the instrument of submission, with the documents in proof, are delivered by the parties to one of the arbitrators, (in general also the oldest,) who examines them, and makes his report thereon at the next meeting; after which the parties and their witnesses are admitted, and the arbitration is proceeded on. It is to be noticed, that from the time the documents are placed in the hands of the arbitrators, no private communication can legally take place (on the subject of the reference) between them and the parties, until the award is completed in all its forms;^f and so it ought to be with us.

f De la Bil. C. 1.
S. 12.

In the case where the reference is to *two* arbitrators, *without the authority* to choose a *third*, and they disagree, it is very properly observed,

—that, their object being to arrive at the end for which they were appointed, viz. to determine the differences between the parties; they have a right to take all the means in their power to complete this intent of the submission, and enable *themselves* to supply the deficiency of the instrument of reference.^v Which ^{v De la Bil. *ibid.*} is reasonable,—for it cannot be imagined that the parties would refer a matter for decision, without intending to provide *all the means* for attaining that end.

CHAPTER VI.

OF THE AWARD.

IN the preceding chapters the author has endeavoured to place before the reader, in a small compass, divested of legal technicalities, and as much as possible of legal quotations,—the Law and the Practice of Arbitration,—up to the final end of all arbitrations—THE AWARD. This is indeed the principal thing to be attended to, and must not be made hastily, but with mature deliberation: for *if this be not properly conceived and worded*, the labours of the arbitrator, and the trouble and anxiety of the parties, will have been worse than uselessly employed.

The *last meeting* of the arbitrators is held for the purpose of giving instructions for the award. The drawing it up should be confided, as before mentioned, to a notary or a solicitor *employed by themselves*, and who is in the *habit* of arranging these matters. But it is *no objection* to the award if it be prepared by the so-

licitor of one of the *parties*.^a And it may be proper to observe, that on any ordinary matter which may be submitted to a professional arbitrator, he is always competent to make his own award ; for no particular words are necessary in making an award ; the term—" I am of opinion," is sufficient.^b

^a 9 Ves. 67.
^b 1 Ry. & Moo. 17.
3 Byth. Prec.
3, n.

The first thing to be done is, to read over attentively the agreement or instrument of reference, that the award may be made in conformity thereto ; and on this subject we cannot do better than use the language of one of the late learned judges of the court of Common Pleas :—

" What is the nature of an award ? It is a
" decree made by a judge or judges, deriving
" authority from the choice of the parties.
" The power of such judge or judges to decide,
" and the duty incumbent on the parties to
" obey the decision, arise *solely* from the con-
" tract of submission : the submission must
" therefore in every case be *examined* for the
" purpose of seeing what the contract is, and
" *by whom*, and *with whom*, and *for what end* it
" is made."^c For though, as it has been ob-

^c 1 Brod. & Bing.
350.

award made of any thing not connected with the subject of dispute is not binding on the parties.^d

^d Kyd, 145.

^e Vide sup. C. III.

It is impossible, therefore, to give any *specific* rules for drawing up an award, as this, like the proceedings of the arbitrators, and the condition of the obligation,^e must depend entirely on the nature of the matters submitted. It may, however, be observed, that the language should be as clear, and explicit, and definite as possible; and if the arbitrator be not conversant with the terms of law, he should take great care that he perfectly understands the words which the notary or solicitor uses; and that they bear precisely the sense which *he* intends they should convey: for though, from the liberality of the judges, a *reasonable* construction is always put upon an award, (they considering an arbitrament as an instrument to make peace, and put a perfect end to matters in controversy,^f) he must not be led away with the idea, that the courts will interfere to relieve him from any difficulties which he may be brought into, by employing an *incompetent* person to frame his award. It is proper, however, to say, that if there be an *ambiguity* in the words used in the award, that such a construction will be given to them, as will best

^f 3 Bulst. 65.
1 Vern. 259.

coincide with the apparent intention of the arbitrators; and the courts will, by *intendment*, restrain the general terms in an award to apply to particular words in the submission; and they will also connect the particular thing awarded with the general words of the submission.^g One thing the arbitrator should most ^{g 1 Saund. 321. n.} carefully attend to, which is,—never to suffer *the reasons* for his decision to appear on the award, nor, if possible to avoid it, to be known; they should be, if only from prudential motives, for ever locked up in his own breast; and he is not compellable by law or equity to discover them;^h according to the definition before given,—that he is an arbitrary judge, from whose sentence there lies no appeal.ⁱ Nor can the arbitrator be called up as a witness, to shew under *what impression* he decided.^j

^h 3 Atk. 644. & ut sup. C. 1.

ⁱ El. Just. 1. iv. t. 6, § 31.

^j 4 Car. & P. 327.

The principal object which the arbitrator should have in view, after that of making a *just, true, and conscientious award*, is that of making such an award as will STAND GOOD IN LAW. For which purpose the following rules *must* be observed:—1. The award must *strictly conform to the submission*. 2. It must

not be of things impossible to be performed.
 3. It must be *reasonable*. 4. It must *not be contrary to any known law*. 5. It must be *certain*. 6. It must be *final*.

The FIRST RULE, therefore, is, (in accordance with what has been said above,)—that the award shall STRICTLY CONFORM TO THE SUBMISSION ; for this, and this alone, must determine the intention of the parties ; and although it is a general rule, that—“*omne actum ab agentis intentione est judicandum,*” and in all contracts the law looks to the intention of the parties, yet it is only from the *words of the instrument* that the arbitrator will be allowed, in making his award, to judge of that intention ; any explanation, therefore, that the parties themselves may give of their intentions, if such explanation at all differ from the words of the submission, must stand for nothing ; for the arbitrator’s power being derived from the agreement is also confined by it,^k and it is not consistent with reason to imagine, that he will be permitted to go beyond it.

^k Dig. l. iv. t. 9.
 § 32. n. 15.

On this subject the following remarks may be made. *First*.—If the submission be confined to *a particular subject of dispute*, while there are other things in controversy between

the parties; an award which extends to any of these other things is void, *as far as it respects them*.¹ If the submission, therefore, be by rule of court, the order in which the words are placed is to be particularly attended to: for if the reference be—"of all matters in dispute between the parties," the power of the arbitrator is confined to the matters in dispute in that suit; but if it be—"of all matters in difference between the parties in the suit,"—his power is not confined to the subject of that particular cause, but extends to every matter in dispute between them."^m

m 2 Bl. Rep. 1118.
2 Term Rep. 644.
Idem, 626.

By a submission "of all actions personal,"—the arbitrators have no power to make an award of any thing in which the parties have only a cause of action. If the submission be,— "of all actions personal, suits and complaints," the word "personal" extends to suits and complaints; and consequently, an award of all actions real is beyond the submission: but if it be,— "of all actions personal, *and* suits and complaints," the word personal does not extend to the latter part; and an award on such a submission may comprehend actions real. If the submission be,— "of all causes of action, suits, debts, reckonings, accounts, sums of money, claims and demands," an award "to

release all bonds, specialties, judgments, executions, and extents," is within the submission ; for as all debts are submitted, the arbitrators have power to make their award concerning the debts themselves, and of course to award a release of every thing by which they are secured.* Where the submission is,—“of all debts, trespasses and injuries,” an award “to release all actions, debts, duties and demands,” is good ; for the word “injuries” is sufficient to comprehend all “demands.”

* 2 Saund. 190.

• 3 Bulst. 312.

Secondly.—The award must not extend to any one who is *a stranger* to the submission.† The decisions on this subject chiefly relate to conveyances of land, and other matters connected with the disposal of real estates, which it is not necessary to notice here ; but a distinction is taken between the case of an act awarded to be done *by* a stranger, and that of an act awarded to be done *to* a stranger, by a party to the submission.

The award of payment of money to a stranger is *generally* void ;‡ but this must be understood to hold, only when such payment can be of no benefit to either party : for an award that one of the parties shall pay so much to a creditor of the other, in discharge of a debt due by the other to that creditor, is unquestionably good ;§

q Godb. 12.

† 1 Lord Raym.
122.

as is also an award to pay a sum of money to the party's solicitor, or banker, on his account or for his benefit. Thus it must appear, that the act to be done is for the *use* or *benefit* of one of the parties.*

* Lutw. 571.
Salk. 74.

If the persons comprehended in the award were in *contemplation* of the submission, though they were not directly parties to it, yet the award is good; as, if it be awarded that all suits shall cease between the parties, or *any others in their behalf*†

† 3 Lutw. 530.

But, as the award of a thing out of the submission cannot be enforced by an action at law, so, neither shall a man by such an award be precluded from claiming his right in equity." Nor shall an award affect the rights of persons *not parties to the submission*."

* Ca. Temp. Fin.
141. Saund. 32,
33.

† Id. 180. 184.

Thirdly.—When it is said, that the award must be *in conformity to the submission*, it is meant,—that if the submission be conditional, "*so as* the arbitrator decide of and concerning the premises," (that is, with the clause, as it was formerly called, "*of ita quod*,"") (1) he must decide upon each distinct matter in dispute of which he has notice." And if

* Dyer, 216.
Lutw. 554.
2 Brownl. 200.

(1) *Ita quod fiat de præmissis*. These were the words made use of in the old legal instrument of submission to arbitration; thence called, "the clause of *Ita quod*."

it be provided,—that “the same award shall be made on or before” a particular day; in this a *condition* is implied, that it shall be made “of and concerning the premises;” (the word “*same*” having a reference to every thing before mentioned,) and the obligation upon the arbitrator to decide expressly *each* point submitted to him, has full force.^x But, where a reference was made by rule of court, “of all matters in difference,” and the award only directed that a verdict should be entered for the plaintiff, this award was held to be good,—though it *did not state* that it was made “of and concerning the premises.”^y

^x Lutw. 202.
Willes, 268.
7 Mod. 340.
7 East, 80.

^y 1 Keb. 790, 865.
1 Sel. & Bar. 106.

But in order to impeach an award made in pursuance of a conditional submission, *on the ground of part* only of the matters in controversy having been decided, the party complaining must distinctly show, that there were *other points* in difference, of which express *notice* was given to the arbitrator, and that he neglected to determine them. The courts will require evidence of this, and will not set the award aside on presumption.^z

^z Rol. Arb. B. 24.
Cald. c. v. &
vide *sixth* rule
ut infra.

Fourthly.—As to *time*, an award of a release of all actions, &c., to the *time of the award*, is good on a submission of “all matters in difference between the parties;” for which two

reasons are given. 1. That it shall not be intended that any new difference has arisen between the time of the submission and of the award, *unless* it be specifically shewn that there has ; and, 2. That a release of all demands, &c., to the time of the submission, is a good performance of an award, ordering a release to be given of all demands, &c., to the time of the award.^a

^a 10 Mod. 201.
Godb. 164.
2 Keb. 471.
et als &
Wat. Arb. c. 7,
§ 2.

Fifthly.—In regard to the *power* of the arbitrator, a case in point may be given, which peculiarly applies to the subject of mercantile arbitrations. On a dispute between two partners, “all matters in difference” were referred to arbitration in the usual form. The arbitrators, among other things, directed the partnership to be dissolved. It was objected, that the arbitrators had exceeded their authority ; but the court held,—that under a submission of all matters in difference by partners, the arbitrators had clearly a power to dissolve the partnership. It being sworn that at the trial, after a juror was withdrawn, and the rule of reference drawn up, the plaintiff openly declared he would not have it understood that the arbitrator had power to dissolve the partnership ; Lord Mansfield, C. J. observed, “That is sufficient evidence out of his own mouth, that the dissolution of partnership was then a matter of differ-

^b Rolle Arb. (B.) 2.
³ Vin. Arb. 42.

^c 1 Taunt. 549.

ence.^b But if an arbitrator has power to award a dissolution of partnership, it is not *obligatory* on him so to do.^c

Sixthly.—The award must embrace *all the matters submitted*. It is a general rule, that unless the arbitrator makes his award of all the matters submitted to him, the award is entirely void. When the submission is of *several specific things*, if it should appear that the arbitrator has not made his award of each of the matters submitted to him, the award is void. As, when three persons, A., B., C., on one side, and D. on the other side, submit disputes between them to arbitration; an award relating to disputes between A. and B. only of one part and D. on the other, is void, for not making any award between C. and D. So, when a cause in which A. was plaintiff and B. defendant, was referred by order of *Nisi Prius*, and by a subsequent order of reference, another cause, in which A. was plaintiff and C. was defendant, was included in the former reference; the terms were “of all matters in difference between the parties, or any or either of them, as co-partners or otherwise;” the arbitrator made two awards, one in the cause between A. and B., and another in the cause between A. and C.; but he did not make any award between B. and C., nor did he state whether or

not A. had any *joint* cause of action against B. and C., and for these objections, particularly for the last, the court set aside both awards.^d d 2 J. B. Moore. 723.

Now, as this *first rule* is of the most material consequence to be observed, it being *the principal one* in all references; let us recapitulate the several points to be attended to. 1. The Award must be *confined* to the particular subject submitted. 2. As regards *persons*; an act cannot be done by a stranger, but may be done *to* a stranger, if for the use or benefit of one of the parties. 3. An Award on a *conditional submission* cannot be set side on the ground that only part of the matters were decided, *unless* it can be shewn that other matters *were expressly pointed out* to the arbitrator, and he neglected to decide them. 4. As to *time*; an Award of a release, &c., *to the time of the award* is good on a submission of "all matters in difference between the parties." 5. On a submission of "all matters in difference" between *partners*,—the award of a dissolution of partnership is good. 6. An Award that does not embrace *all* the matters submitted to the arbitrator is bad.

The **SECOND RULE** is,—that the Award *must not be of things IMPOSSIBLE to be performed.*

According to the law maxim,—“*Lex neminem cogit ad impossibilia.*” It certainly appears to be one of the most justifiable reasons for setting aside an award, that it directs a thing to be done, which is in its nature physically or morally impossible.

Under this head, as may be expected, few cases have come before the courts; but the following may be quoted to illustrate the principle, *e. g.* where a party was directed to give up a deed which was in the custody of a person over whom he had no controul;^e or, where it was ordered that he should procure a person to be bound for him, for a sum of money;^f or, that the defendant in a cause should be bound with sureties which the plaintiff should approve,—because it may be impossible to force the approbation of the plaintiff.^g Such, and similar awards, would be set aside. But this doctrine must not be supposed to extend to a case, where a man is ordered to pay a sum of money, and he has not that sum in his possession, nor any means of obtaining it,—against such an award a party will not be allowed to plead *impossibility*; for in order to vitiate the award the impossibility must arise *ex natura*

^e 12 Mod. 385.

^f Rol. Arb. F. 2, 3, 4.

^g 3 Mod. 272. Kyd, c. v.

^h Cald. ch. v. Wat. Arb. c. 7, *rei.*^h
ⁱ 6.

The THIRD RULE is,—that the Award must

be REASONABLE. This follows from the instrument itself; for the power given to an arbitrator to determine what he shall think fit to be done, must be confined to *reasonable* acts.¹—

¹ 5 Taunt. 400.

Whatever is unreasonable is unjust; and the law says, “whatever is inconvenient and contrary to reason is not permitted.” But it must not be inferred from this, that *the parties*, or any one but the courts of law, are to be the judges of what is reasonable; and a clear case of unreasonableness must be made out to the satisfaction of the courts, before they will interfere to set aside an award on that ground. As it is the duty of an arbitrator to judge impartially, *he* must determine for himself what is reasonable, and no specific rules can be given to guide him;—but in general, if the award be extravagantly disproportioned to the circumstances of the case, performance will not be enforced.² A few instances of what has been considered by the courts of law to be *unreasonable* may be given:—*e. g.* that one shall serve the other for two years in satisfaction of an action; also that one party should pay the other £300 to repair his honour, for calling him “bankrupt knave,” were considered unreasonable. It was also considered unreasonable, that a guardian of an infant should be awarded to

² Rol. Arb. F. 1.
³ Mod. 63.
⁴ Chan. Rep. 76.
⁵ Vern. 251.

give his bond for the performance of an act by the infant on acquiring his age.^{*} But it is clear that whether an award be reasonable or not must depend upon the particular circumstances of each individual case; and it must be a very strong case of unreasonableness before the courts will set aside an award on that ground. Where, however an arbitrator decides a question of law, the courts will not inquire whether it be *unreasonable*;[†] for, where a point of law is referred to an arbitrator, the parties are bound by his decision, whether right or wrong, unless fraud or corruption is imputable.[‡]

^{*} Wat. Arb. c. 7.
[†] 6.

[†] 1 Swan. 53.
[†] 1 Wils. 34.

[‡] 6 Ves. 282.
[‡] 9 *id.* 304.
[‡] 2 Madd. 6.

The **FOURTH RULE** is,—that the Award must **NOT BE CONTRARY TO LAW**. This rule has some *limitation*, and must not be construed strictly. In a case where no lawyer could doubt upon the point of law, the following distinction was laid down by the court of King's Bench:—that where the arbitrators *meaning to follow the law*, happen to mistake it, this is a good reason for setting aside their award, so far as it is affected by that mistake: but where, knowing what the law is, or laying it entirely out of their consideration, they make what they conceive, under all the circumstances of the case, to be an equitable decision, it is no objection to the award,

that in some particular point it is manifestly against law." But Lord Hardwicke said, "if ^{n Kyd, 281.} the arbitrators appear to be mistaken in a doubtful point of law, the award may be permitted to stand, though the court should be of a different opinion from the arbitrator.^o And ^{o 3 Atk. 402. (495.)} the court of King's Bench has decided, that an award could not be set aside on the ground, merely that an arbitrator was mistaken in a point of law ; for in such a case it must be satisfactorily proved that he would not have made such an award if he had known what the law was.^p Neither will an award be set aside, if ^{p 3 B. & Ald. 237.} the arbitrator in a matter of mixed law and fact mistake some of the points.^q It was indeed ^{q 6 Taunt. 255.} well and liberally observed from the bench on a late arbitration cause, that "it is always painful for the courts to give a judgment upon strict legal and technical objections against the real justice of the case, but they are always pleased when the giving effect to what justice requires will violate no rule of law." The general principle is,—that the award must not be contrary to any clear, well-established and defined point of law ;^r for neither the courts of justice, nor an arbitrator, can be allowed to depart from the rules which are founded on the

^r 1 Brod. & Bing. 350.

^s 3 B. & Ald. 237.
⁶ Taunt. 255.

immutable principles of justice; and, if an arbitrator act contrary to a known general law, it is undoubtedly the duty of the court to set aside his award.^f Where, for instance, an arbitrator ordered a party to do a thing which would make him liable to an action,—the court set aside so much of the award, saying, that they could not allow a party to an award to be attached on one side, for not doing that, for which, on the other side, he might be sued.^g If an arbitrator, after making an award, says, — “I meant to make my award according to law, and have misconceived the law,” or “I have mistaken the fact,” his award will be set aside.^h An arbitrator is not however to be confined by rules of strict law,—Lord Talbot said, “Arbitrators are in the nature of judges, and in some respects have a greater latitude, not being confined within the rules of law or equity, and therefore may make such allowances as cannot be made in courts of judicature.”^w In a reference of “all matters in difference” an arbitrator ought to consider not *legal* demands only, but also equitable demands, demands of all sorts.^x Nor, is an arbitrator to be confined by the practice of the courts of law; — for where arbitrators had

^f 2 B. & Ald. 691.

^g 5 Taunt. 454.

^h 1 Taunt. 48.

^w 2 Eq. Ca. ab. 60.

^x 1 Taunt. 48.

awarded interest on particular sums (1) contrary to an established practice of the courts, the court of King's Bench refused to set aside the award on that ground, observing that an arbitrator is not bound by the strict rules of practice, but is to do justice between the parties, according to the particular circumstances of each case.^y

^y B. & Ald. 691.

Finally, — it may be remarked, — that an award is similar to a verdict, (*vere dictum*) for an award no more than a verdict, can make that good which is not good in law, else an arbitrator would be paramount to the law, which can never be permitted.

The FIFTH rule is, — that the award shall be CERTAIN. The Roman law says, a judge ought always to take as much care as possible so to frame his sentence, that it may be given for a thing or sum certain; although the claim upon which the sentence is founded, may be for an uncertain sum or quantity;^z and it may

^z El. Just. l. iv.
l. 6. § 32.

(1) The allowance of interest is peculiarly the subject for the consideration of an arbitrator, for *interest is the damage for the detention of a debt.*^a

^a C. J. Abbot.

In regard to *interest* it may be noticed that it has been lately decided in an action on the award, that the plaintiff is entitled to recover interest from the time of *demanding* the sum awarded, as a *liquidated* sum.^b

^b 4 Car. & Pa. 327.
& see Bar. & Ad.
777.

be remarked, that the only motive which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is to have an amicable and easy settlement of something which is in its nature uncertain.^c

^c Kyd, c. iii.

It has been before observed, that the words of the award should be clear, definite, and explicit ; to which we may add, that the purport ought to be so plainly expressed, that there may be no uncertainty in what manner the parties are to put it in execution, but that they may know precisely what it is they are ordered to perform.^d It ought to be so expressed, that

^d Kyd, c. v.

no reasonable doubt can arise upon the face of it, as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties.^e

^e Rol. Arb. 21.
Burr. 275.
Cald. 104.

To elucidate this rule we quote the following cases. An award was held not to be certain which directed, that one of the parties should deliver up to the other "a certain writing obligatory, or a certain bill obligatory, which he had before ;" this was held to be altogether uncertain, for it did not say of what sum, nor of what penalty the bond was, nor of whom it was obtained.^f And the same was held of an award, "that one of the parties should give

^f 1 Lord Raym.
124.

security for the payment of a sum of money,

either in one gross sum, or at different specific times, or annually for life," because, it is said, he cannot tell what kind of security is meant, whether by bond or otherwise.^g An arbitrator, on a reference by rule of court, awarded that the defendant should pay to the plaintiff "so much for each quarter, as a quarter of malt was then *sold* for;" the award was held to be void for uncertainty, because it was not mentioned in what place the price was to be taken.^h

^g Bultar. 200.
Cro. Jac. 315.
2 Str. 1024.

^h Lutw. 550.
Rol. Arb. 2. 7.

An award was held to be bad, where the arbitrators awarded that a certain sum was due from the defendant to the plaintiff, and that out of such sum the defendant should pay to the arbitrators £——, being the expenses of preparing the agreement of reference and of their award, and for their attendance, and certain costs which they awarded. to be paid to the plaintiff's attorney for costs of the actions. It was bad, because it did not specify *the particular sum* to be appropriated to each object, and included an *indefinite* allowance to themselves.ⁱ And under the head of *uncertainty*, we may quote the following:—the award of the umpire (who was named by the two arbitrators,) was to be binding, "so as it were made within six *months* next after the date of his appointment." The appointment was made by

ⁱ 6 M & Sel. 276.

indorsement, dated 16th August, and the award was dated 12th February following;—it was held, that there being nothing *ultra*, the expression to explain the meaning of the arbitrators, the six months must be taken as *lunar*, and the umpirage was therefore bad.^j

^j *Idem*, 226.

The following award was also held to be bad: as when the defendant had paid £600 into court, and the cause and all matters in difference were referred, and the arbitrator awarded that the defendant had overpaid the plaintiff £34. The court thought there was sufficient *doubt* on the face of the award to justify the refusal of an attachment, and to leave the plaintiff to his remedy by action.^k

^k 8 Bing. 13.
6 Moore & P. 38.

But in general, if the matter or thing to which the objection of uncertainty is made, can be ascertained either by the context of the award, or from the nature of the thing awarded, or by a manifest reference to something connected with it, the objection will not prevail.^l For, in the construction of an award the courts are bound, so far as the terms will admit, to give to it such a meaning as will render it conclusive.^m

^l Kyd, 193.

^m 1 Swanst. 53.
1 Wils. 34.

Here it may be noticed, that the circumstance of an award being in the *alternative*, will not invalidate it, for no doubt can arise on

a direction, that a party shall perform one of two things, though it be left for him to determine which he will perform."

* Leon. 140.
12 Mod. 585.
1 Taunt. 559.
Cald. 107.

SIXTHLY, the award must be FINAL. The general requisites of an award are, that it be certain and final.^o This is recognised by the Roman law as the principal object of all arbitrations.^p No rule can indeed be better founded than this. An award, however, will rarely be set aside on this ground, where it is the evident intention of the arbitrator, that the matters in difference should be laid at rest; and where the award is final, as far as, under the circumstances of the case, might be reasonably expected.

o 1 Rolle Abr. 263.
1 Bac. Abr. Arb.
(E) 2. Vide 3
Byth. Pre. 12,
13.
p Dig. 1. 4. t. 8.
§ 37.

The award "that all suits shall cease" was held to be final, and was considered as if it had been said—all suits shall cease for ever; for the determining the suit determined the right of the thing, because the party has no other remedy but by suit.^q And an award made upon a reference, "of all then existing disputes" was not considered the less final, because the arbitrator had extended it only to the two actions then pending, and had not taken equitable claims into his consideration.^r But an award, "that each party shall be nonsuited

q 6 Mod. 33.
2 Ld. Raym.
961. 1 Salk. 74.

r 1 Moore, (C.
P.) 4.

in the action which he has brought against the other," is not final, and therefore not good ; because a nonsuit does not bar them from bringing a fresh action.* That an award of a nonsuit is *not final*, has been uniformly held from the first law proceedings in England to the present day.† (1)

* Fhbt. 51. a. 6.
Brooke, 45. a.

† 6 Mod. 232.
1 Barnard, 463.
et al.

If the award be of a thing to be done at a future day, it is final, if it must then be absolutely done ; as, if it be to pay money at three several days to come,*—or to give a note or a bond for the payment of money at a future day.† But, if it depend on a condition whether it must be executed or not, then it is not final ; as, if it be, that the money shall be refunded, if it appear afterwards that the party was not entitled to retain it.‡

* Palm. 110.

† 2 Str. 1032.

‡ Palm. 110.

When the arbitrator simply found by his award that the plaintiff had *no cause of action*, this was held to be sufficient, notwithstanding there were *various* mutual claims between the parties.§

§ 6 Bing. 225.

It was formerly considered that an award must be *mutual* to render it valid ; that is, that

(1) But Watson on this subject has the following note :—
"Rolle Arbitr. (I) 16. In the Year Book, however, which Rolle cites, this is doubted ; indeed, if the reference be an action, a nonsuit *does put a final termination to the matter referred.*"¶ Therefore *quære*.

¶ Wat. Arb. P.
126.

it ought not to give an advantage to one party without an equivalent to the other;—and much has been said in the old law books to enforce this rule; but, after all, it may be resolved into the principle, that the thing awarded to be done should be a final discharge of all claims, by the party in whose favour the award is made, against the other for the cause submitted; and therefore, amounts to nothing more than a different form of expression of the case, which requires that an award shall be *final*.^a

^a Kyd, 219.

The *reservation*, or the *delegation* of the authority of the arbitrator, may also be considered as a branch of this rule. If, for instance, he reserve to himself the authority to alter the whole or any part of the award, such reservation is clearly void;^a for the principal rule in the construction of awards is, that they shall be certain and definite; and, if the arbitrator reserves a power over any thing, the award is not final.^b As, if the arbitrators order that one of the parties shall give security to the other, for the payment of a sum of money, but *reserve* to themselves the power of considering the propriety of such security; or, if they *reserve* to themselves the power of explaining any doubt that may arise on the meaning of

^a 2 Rol. Rep. 189. Palm. 110. 146.

^b Rol. Arb. H. 10. 12 Mod. 139.

2 Rol. Rep.
214, 215.

any part of the award.^c But an award, that one of the parties should pay to the other £105, on a certain day, and if he did not pay it then, that he should pay at a future day £110, was said to be good ; because it is not a reservation of a future authority, but a penalty to enforce payment at the day, which is within the power of the arbitrators.^d

d Rol. Arb. H. 8.

And, again as to the *delegation* of the power of the arbitrators, it appears clear that it is not within the implied intention of the submission, and it is therefore a branch of the *first* general rule for making the award, as well as of *this* ; that it applies to this is obvious, and scarcely needs an example to prove it.

e 6 Ves. 846.

But, if the arbitrators award the substance of the thing, and leave the *form* to be settled by another, this is not such a delegation of authority as to invalidate the award.^e Thus, where the arbitrators ordered mutual releases to be executed, and left it to a Master in Chancery to settle the form, this was not considered a delegation of authority.^f Nor is it such a delegation as to defeat the award, if the arbitrator direct that the parties shall abide by the award of a former arbitrator.^g If, however, instead of deciding the matter himself, the arbitrator direct that the parties shall stand to

f 2 Atk. 501.

g 39 H. 6. 11. a.

the award of another, this direction of the arbitrator, and of course the award delegated by him, are bad.—Because the submission of the parties to an individual, arises from the confidence they repose in his integrity and skill, and is merely personal to him; the leaving the matter submitted to him to be decided by another, is therefore contrary to the scope of the reference.^A

^A Dig. l. iv. t. 8.
 §. 32, n. 16.
 Rol. Arb. H. 11.
 B. 20. Hard.
 43. Jenk. 128.

Another branch of this rule is, that the award shall not be *of part only* of the things submitted. But this must be understood with a considerable degree of limitation; for if the thing awarded necessarily includes the other things mentioned in the submission,—as the award of one particular thing to be done for the ending of a hundred matters in difference, the award is good.^I And, as of several things, so it is of several persons; for if two on one side and one on the other submit, the arbitrator may make an award between one of the two of the one part, and the other of the other part; and such an award will stand good.^J And where actions and all matters in difference were referred, and the award decided the former only, it was held that it is *no objection* to the award that a claim not included in the action was brought before the arbitrator, and that he had not adjudicated

^I 1 Keb. 738.
 1 Lev. 132.

^J Kyd, 182, &c.

thereon, *unless it appear* that the claim was
* 1 Nev. & Man. 121. *not* taken into consideration.*

By the law of Scotland an award is good as to the part decided, although the arbitrator shall *not* have decided on the *whole matter*, it
1 1 Dow & C. 121. being unobjectionable in other respects.†

After all that has been written on the subject of making the award final, the best mode appears to be, wherever it is practicable, to order, that after the execution of the other parts of the award, mutual releases shall be executed to the date of the submission.

Having thus treated of the *principal general rules* to be observed in making the award, we proceed to those miscellaneous subjects which could not with propriety be brought under the foregoing heads.

We have seen, that an award must be made *first*,—in *conformity to the submission*. *Secondly*,—that it must not direct things to be performed which are in their nature *impossible*. *Thirdly*,—that it must be consonant to *reason*. *Fourthly*,—that it must not be contrary to any known, well-established law. *Fifthly*,—that it must be *certain*; and *sixthly*,—that it

must be *final*; and which includes the rules, that the arbitrator cannot reserve or delegate his authority; nor make an award of only part of the matters submitted. These are the principal rules for making, and the qualities necessary for constituting a good award; and, unless they are attended to in the formation of it, an award may in general, either in whole or in part, be set aside.

Besides these, there are many other causes for setting aside an award. But it may be remarked, that in all these cases, where it is said, that the court will “*set aside* the award,” it is not meant to be understood literally; for no court of law or of equity can *set aside an award*, made in pursuance of the statute (9 and 10, W. III. C. 15), on any other ground than that it was “procured by corruption or undue means;” for these are the words of the act.(1)

(1) The words of the act are these:—Sect. 2. “And be it further enacted, by the authority aforesaid, that any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties; any thing in this act contained to the contrary notwithstanding.”

It therefore follows, that the only power which the courts have in any *other* case is “to refuse to enforce the award by attachment, thus leaving the party to an action on the bond or on the award itself.”^m

^m 7. T. R. 73.
5 Andr. 287.
2 Bythew. Con.
578, n.

This statute does not apply to submissions by *parole*, and therefore an award under such a submission can only be set aside for the *misconduct* of the arbitrators by a bill in equity.ⁿ

ⁿ 1 Saund. 327.
2 Ch. Rep. 88.
2 Vern. 101, 251.
2 Bythew. Con.
575.

According to the law of Scotland, this is the *only* cause for setting aside an award; for by the Acts of *Sederunt* of 1695, the courts of judicature cannot entertain a motion for setting aside “a decree-arbitral upon any cause or reason whatsoever, unless of corruption, bribery or falsehood, to be alleged against the judges arbiters who pronounced the same.” By falsehood is here meant, forgery or vitiation of the submission, or of the award.^o Lord Hardwicke was also of this opinion, for he is reported to have said, “that the only ground to impeach an award is, collusion or gross misbehaviour in the arbitrators.”^p

^o Erskine, B. iv.
tit. 3, § 35.

^p 3 Atk. 497. (530.)

Misconduct, or gross partiality, is in its strongest sense closely allied to fraud, but it may also be venial. To *imputed* misconduct the courts will certainly not listen; for this is the most frequent subject of complaint by the

party who thinks himself aggrieved; an affidavit therefore, for a motion to set aside an award on this ground, must state the precise points which were submitted to the arbitrator, and shew in what his misconduct consisted: and where an award was sought to be set aside, on the ground that the arbitrator had not noticed a certain clause in the agreement of reference, the court discharged the rule with costs, in consequence of the affidavit not shewing, as it ought to have done, "that the clause in this agreement was distinctly pointed out to the arbitrator, and that he was expressly required to act upon it."^q Where, however, the case is ^{q 2 B. & Ald, 701.} clearly made out, the award will be set aside. Under this head several cases appear, from which we shall quote the following:—Where the submission was to three arbitrators, or any two of them, and two by undue means excluded the third, the award of the two would be set aside;^r and so, if the arbitrators hold private ^{r 2 Vern. 515. & ut sup. C. V.} meetings with one of the parties, and admit him to be heard to induce an alteration in their award;^s and also, where the arbitrators pro- ^{s 2 Vern. 46.} mised to hear witnesses, but made their award without hearing any;^t and where they pro- ^{t Id. 251.} mised not to make their award until one of the parties should come from abroad, but they

^a *Id.* 46.

made it before.^a And so, if a party, even so late as two or three days before the time for making the award expired, required the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him; and the arbitrator refused.^b Also where an arbitrator received evidence after having given notice to the parties that he would receive no more, and this in the absence of a party who, if present might by examination have qualified such evidence.^c

^b 3 P. W. 302.
^c 2 Chit. Prac. 118.

^d 6 Vern. 70.

The rule of the court of Chancery appears to be this, that to set aside an award on the ground of misconduct of the arbitrator, it must be of such a nature as it is probable might have affected the decision *on the merits and justice* of the case.^e

^e 2 Chit. Prac. 118.

These and similar cases may be ranked under the head of misconduct, or at least of that of gross partiality; and the following is nearly allied to them;—as, where the arbitrators had an interest in the subject of reference;^f this, a court of equity considered a sufficient ground for setting aside the award: it related to a cargo, in which the arbitrators were interested, and five days after the award was delivered they attached the money awarded, for debts owing to them by the party in whose favour the award

^f *Ut sup.* p. 7.

was made ; the court set it aside ; on the presumption that the arbitrators might have put too great a value on the cargo, from the interest they had in the subject.^a

^a 2 Vern. 251.

There are cases, as it has been remarked, where the misconduct may be *venial*, but yet the award would not be allowed to stand:—as where the arbitrators had insisted on three guineas a-piece to be paid them by each of the parties, before making their award, for their trouble and expenses ; the defendant refused to do it on his part, and the plaintiff paid the whole money. The court thought this a matter of so delicate a nature, and *the example so dangerous* that they set aside the award on *that* ground,—because if it should be suffered, it would be hard to distinguish what was corruption.^a The tossing up of a piece of money, for who should name the umpire, was also considered a sufficient instance of misconduct to cause the award to be set aside.^b It was thought at one time, that the circumstance of the arbitrator's employing the attorney of the party, in whose favour the award was made, to draw it up, was a proof of corruption ; but there is no case in point ; nor does it appear to be by any means a justifiable reason for

^a 2 Barnard, 463.

^b 2 Vern. 485, & ut sup. p. 51.

setting aside, or even calling in question, an award.^c

^c Kyd, 349.

Nor will the following vitiate the award:—

A stranger joining in it;—because it is not the

^d 4 Taunt. 232.

less the award of the arbitrators;^d this is also

^e Ut sup. p. 65.

the law of France.^e The award having no

date; because it takes effect and becomes bind-

^f 6 Mod. 244.
² Ld. Raym. 1076.
Salk. 76, 408.
³ Bulstr. 312.

ing only from the day of the delivery;^f the

having no stamp, or an improper stamp; be-

cause the court will leave the party in whose

favour it is made to procure the proper stamp

^g 7 Term. Rep. 95.

to it on paying the penalty;^g nor will *mis-*

conception or mistake of one of the arbitra-

tors be considered sufficient to set aside an

award.

Thus we find, that the award may be impeached, either from objections appearing on the face of it,—as not being made in conformity to the rules above mentioned; or from *extrinsic* circumstances,—such as the misconduct of the arbitrators. It has been seen, that by the express words of the statute, an award can be *set aside* only from its being “procured by corruption or undue means;” but a court of equity will set the award aside, or rather refuse an attachment, for fraud or concealment of either of the *parties*.^j It is said,^k however, that this

^j 2 Eq. Ca. Abr.
80.
^k Cald. 174.

clause in the statute is not to be construed too strictly. Any other objections, which are plainly *dehors* the award, may be urged in the same manner as those founded upon corrupt conduct; such as, that the arbitrators or umpire have altered the award, after notice to the parties of its being executed and ready for delivery;^l (1) and that they had not at the time of making the award, sufficient documents or information from which to draw a correct opinion.^m

^l East, 310.

^m 2 Term Rep. 781.

It has been said before, that an arbitrator cannot be compelled to discover *the reasons which influenced him* in making his award; but if there be any *palpable mistake*, the party aggrieved must bring his bill in Equity against the other party, to have it rectified.ⁿ But in a reference by rule of *Nisi Prius*, application may

ⁿ 3 Atk. 644, and see note at foot.

(1) It is scarcely necessary to say, that after an award is once made and delivered, no subsequent alteration by the arbitrator can avail; for even before the delivery of the award, if it be in fact made, and notice given to the parties no change can be effected.ⁿ Lord Ellenborough observed, that “the arbitrator’s authority having been *once completely exercised*, pursuant to the terms of the submission, was at an end, and could not be revived, even for the purpose of correcting a mistaken calculation of figures.^o It is probable however, that a court of equity would interfere on such an occasion, if the submission were made a rule of such a court.

ⁿ 6 East, 309.

^o 8 East, 53.

be made to an arbitrator to state (of course if he think proper,) on what ground he gave the damages; or the award may be sent back to the arbitrator for his re-consideration.^o

^o 5 Taunt. 460.

Much has been said on the subject of the arbitrator's giving notice of the award, and it was formerly contended that the parties would forfeit their bonds, by not taking notice of it themselves;^p but as there can at the present day be no doubt on the mind of any one, of the propriety of giving notice when the award is ready to be delivered, it is not necessary to trouble the reader on this subject.

^p Kyd, 107.

We shall only add, that when the award is made, the law implies *it is ready to be delivered*. Thus, an award, which is required to be made in writing, &c., and *ready to be delivered* at such a time, is complete, if made in writing, and ready to be delivered *within the time*, though not *actually* delivered.^q So when, by the terms of reference, attestation and delivery are not necessary to *perfect* an award,—if it be once complete by the *signature* of an umpire or arbitrator, it is then ready for delivery, though not attested or delivered.^r

^q 4 East, 584.
³ Byth, Pre, 2.

^r 6 East, 310.

It is not the author's intention to treat of the course of proceedings to *compel* the performance of the award, nor of the means to be used when it is sought to *set it aside*: this would be invading the province of the lawyer, which is certainly not his wish; for this he refers to the works mentioned in the preface. The following, however, may not perhaps be considered as improper even in a professedly practical work.

It is not necessary that the arbitrator should point out the method in which his award is to be carried into execution; for, such a rule, it has been observed, would overturn a great number of awards.[†]

[†] 2 Atk. 501.

As to the *performance*, it need not be literal, for if it be virtually done, it is all that is required;[‡] and a performance by attorney, or authorized agent, is equivalent to a performance by the principal;[§] and if a party make every exertion in his power to fulfil the intentions of the arbitrator, and circumstances not under his controul prevent him, this is sufficient,^{||} for the law will no more require an impossibility in the performance of an award, than permit it in the formation of the submission; but a man is bound to do every thing within his ability to give effect to his performance.

[‡] 3 Bulstr. 62.
[§] 4 Leon. 110.

[§] See Jenk. 136.

^{||} 13 East, *Reg*

If no time be limited by the award for its

^w Vin. Arb. Q. 11. performance, a reasonable time is assumed.^w
Jenk. 136. Salk.
60.

If an award be void in part, the party must

^x 2 Lev. 6. Yelv. perform what is valid.^x
^{98.} 1 Brownl. 92,
&c.

When the payment of money is directed, the party must pay it; he cannot set it off against a counter-demand.^y

^y Barnes, 56.

In case of death, the executors must obey the directions of the award; and if the party die, in whose favour an award is made, the money must be paid to his representatives, even though no mention be made of them in the award.^z

^z 2 Vent. 249.
1 Leon. 316.
3 *Idem*, 212.

If an award be lost, a copy must be produced, substantiated by affidavits, and the attachment will issue as on the original.^a

^a 1 Stra. 526.
3 Taunt. 45.

Where an attempt is made to set aside an award on a submission under the statute, the motion must be made before the end of the next term after making the award, in the court where the submission is recorded; and it has been before remarked, that nothing is a ground, within the statute, for setting aside an award, but the *misconduct* of the arbitrators; the courts will not therefore grant a motion to set aside an award for an objection appearing on the face of it, though that will be a

good reason for refusing an attachment to enforce it.^b

^b 5 Andr. 297.
7 Term Rep. 73.
Kyd, 342.
& ut sup. p. 93.

It may be readily conceived, that the courts will not listen to a motion to set aside an award, on *frivolous* pretences, such, for instance, — as the *alleged* misconduct, or partiality, or erroneous judgment of the arbitrators. Lord Loughborough declared, that if the parties agreed to refer the whole matters in difference to judges of their own choice, *he* could not correct the error of their judgment.^c If indeed, every one who objected to the award of an arbitrator were to be listened to, the courts would have little else to do; nothing being more general, than for *one* of the parties to be dissatisfied; yet, it has been well observed, if they were not sometimes to interfere and grant relief, arbitrators would have too great a power and might abuse it from corrupt motives.^d

^c 2 Ves. jun. 22.

^d Ves. 315.
2 Wils. 149.

It has been the author's endeavour in the preceding pages, to place before the reader in as small a compass as the nature of the subject would admit of, a short treatise on the law, the

principles, and the practice of arbitration, — which he hopes will be found useful to merchants and the members of Lloyd's, to whom he most respectfully submits it.

APPENDIX.

"IT HAS RECENTLY BEEN ATTEMPTED TO INTRODUCE A POWER
"OF *compelling* ALL PERSONS TO REFER CERTAIN MATTERS OF
"ACCOUNT TO ARBITRATION, WHEN UNFIT TO BE TRIED BY A
"JURY, BUT THE MEASURE HAS NOT YET PASSED INTO A LAW."
—Chitty, *Prac. Law*. Vol. I. p. 21.

BEFORE this work is closed, a few words may be permitted the author on the subject of compulsory or FORCED ARBITRATIONS. The principle has been already recognised by the legislature as a useful and beneficial one to be adopted under various circumstances, viz.:— In the settlement of disputes between *masters and workmen*,^a and between *masters and servants* employed in husbandry;^b—for the summary settlement of *seamen's wages*^c and for the arrangement of *salvage*;^d—also for determining the differences which might arise between the members of Friendly Societies^e and the claims of the creditors of the Saving Banks.^f

^a 5 Geo. 4, c. 96.

^b 4 Geo. 4, c. 34.

^c 10 Geo. 4, c. 52.

^d 59 Geo. 3, c. 58.

^e 1 & 2 Geo. 4, c. 75.

^f 10 Geo. 4, c. 56.

^g *Idem.* &
9 Geo. 4, c. 92,
§ 45, & vide Chit.
Prac. Vol. II. 74.

All these statutes were made with the benevolent intention of *compelling* the parties to act for their own good ; forced arbitration is therefore not new to us ; though on this subject we read in the work, quoted at the head of this appendix, (and to which the author has already acknowledged his obligations,) that, “ as *trial by jury* has long been considered every Englishman’s birth-right, it is not surprising that hitherto any attempt generally to take away that right, and *force* arbitration, even under the recommendation of a judge, has been unsuccessful.”^g

There is no doubt, that the word *force* or *compulsion* always sounds harsh and unpleasing in the ear of an Englishman ; and that even a hint at the attempt to take away “ generally ” our great palladium,—a trial by jury, would not for an instant be listened to with patience in this free and enlightened age ; and most assuredly no one can be more averse from trenching on the liberty of the individual than the writer of this ; but what he would suggest has no tendency that way, for it will not in any manner affect the right of trial by jury, the differences in question not being cognizable by that species of tribunal. The use of law is to regulate the passions of men and to provide a

remedy for the abuses of them ; if therefore, the legislature should in its wisdom deem it proper to deviate once more from the general principle, in the expectation of thereby rendering essential benefit to society, no one would probably be found to complain, but, on the contrary, this new infringement on the liberty of the individual would be received as a boon by the commercial world.

We allude to the subject already hinted at,^h *Ante*, p. 26. of the mode of settling DISPUTES BETWEEN PARTNERS in mercantile concerns. "Copartnery," is called by civilians, "the mother of discord;" and so (without any intention of depreciating its usefulness) it is frequently found to be. The persons who enter into it, notwithstanding every friendly feeling they may have towards each other at the time, appear to foresee that differences of opinion *may* arise between them ; for the amicable arrangement of which, when they shall arrive, they naturally wish to provide a prompt and efficacious remedy, in the agreement containing the regulations to be observed by them in their newly-formed connexion ; instead of being obliged to have recourse to the only alternative,—a probably long-protracted, and a certainly expensive suit in chancery. But this provident *clause*,

of a reference of their disputes to arbitration, which they *wish* to insert in their articles of partnership, is, we have seen, unavailable and useless; for “*without it* they may, if they should so choose, have recourse to this mode of settlement of their differences; and *with it*, neither party could be *compelled* to act upon it.”

Now it would seem to be an object of consequence, that some mode should be pointed out, by which THIS CLAUSE, so desirable to all the parties when *entering into* their contract, may be made *available* by them; and that thus they may be FORCED to do *that* at a time when they may *differ*, which they acknowledged, when they *agreed*, would be for their mutual benefit.

The French, though so far behind us in the extent of their external commerce, have made a provision for the settlement of partnership disputes, in the manner which we have ventured to suggest. By an edict of François II., so long ago as the middle of the sixteenth century (1560), the principle of *forced arbitration* was admitted in cases of disputes “*entre marchands et pour faits de commerce* ;” and thus these “*contestations*” were taken out of the

ordinary jurisdiction in civil cases, and the parties were "*contraints*" to submit them to the decision of arbitration; for these differences, it is said,—"*doivent être vidés sommairement par trois personnes au plus accordées entre eux, ou dont ils étaient contraints de s'accorder par le juge des lieux.*"

As the nation became more enlightened, and its commerce increased, modifications and ameliorations were made in its laws; and in 1673, the celebrated *ordonnance de Louis XIV.* established the principle of FORCED ARBITRATION OF DISPUTES IN COMMERCIAL PARTNERSHIPS on a solid basis. The dispositions of this *ordonnance* appeared, after the trial of its efficacy for more than a century, to be so well adapted to the proposed end, that the legislators of our days, who had the formation of the new code of laws intituled, "*le Code de Napoléon*," retained so much of it as related to this subject, (only expressing it more explicitly,) in the *Code de Commerce*, under the title—"Des Contestations entre associés, et de la manière de les décider."[†] Indeed, the terms of the modern law are *imperative*, and the law itself is thus made more effective than it was by the ancient edict and ordinance; and nothing now left to the *will* of the parties.

[†] Code de Com.
Liv. 1. Tit. 3. § 2.

The edict of 1560 admitted the principle ; the ordinance of 1673 confirmed the edict, and made regulations to put it in practice ; but it was not until the Commercial Code was promulgated, that the law was made imperative and absolute.

The second volume of "A General Treatise on Arbitration in Civil and Commercial Matters," (1) by M. de la Bilennerie,* contains at length all that has been written by the *jurisconsultes* and decided by the courts on this subject. From this work we extract the most prominent articles in the *Code de Commerce*.

* See Preface.

Art. 51. *Toute contestation entre associés, et pour raison de la société, sera jugée par des arbitres.*

Art. 55. *En cas de refus de l'un ou de plusieurs des associés de nommer des arbitres, les arbitres sont nommés d'office par le tribunal de commerce.*

Art. 56. *Les parties remettent leurs pièces et mémoires aux arbitres, sans aucune formalité de justice.*

(1) *Traité Général DE L'ARBITRAGE en Matière Civile et Commerciale.* (Paris, 1834.) Tome II. titre 2. DE L'ARBITRAGE FORCÉ, ou de l'Arbitrage en matière de Société Commerciale.

Art. 57. L'associé en retard de remettre les pièces et mémoires, est sommé de le faire dans les dix jours.

Art. 58. Les arbitres peuvent, suivant l'exigence des cas, proroger le délai pour la production des pièces.

Art. 59. S'il n'y a renouvellement de délai, ou si le nouveau délai est expiré, les arbitres jugent sur les seules pièces et mémoires remis.

Art. 60. En cas de partage, les arbitres nomment un sur-arbitre, s'il n'est nommé par le compromis ; si les arbitres sont discordans sur le choix, le sur-arbitre est nommé par le tribunal de commerce.

Art. 60. Le jugement arbitral est motivé.

ERRATA.

Page 43, line 17, *dele* "nor."

46, — 6, *note*, for "subject to reference," *read*, subject to a reference.

54, — 4, for "contaning," *read*, containing.

81, — 22, after "law," insert (").

86, — 3, after "*ultra*," *dele* (,).

109, — last line, after "thing," *insert*—is.

110, — 5, for "mas," *read*—was.

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